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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

STATE OF MICHIGAN, MICHIGAN PUBLIC SERVICE COMMISSION, WILLIAM E. LONG and EDWYNA G. ANDERSON,
Petitioners,

v.

PANHANDLE EASTERN PIPE LINE COMPANY and NATIONAL STEEL CORPORATION,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTION PRESENTED

Whether a Michigan statute regulating local distribution, including the construction of local facilities and the direct delivery of natural gas to the ultimate consumer in Michigan, 1929 P.A. 69, M.C.L. 460.501 *et seq.*, is preempted by the Natural Gas Act, 15 U.S.C. §§ 717 *et seq.*?

LIST OF PARTIES

The parties before the United States Court of Appeals for the Sixth Circuit were:

Appellants

The State of Michigan, Michigan Public Service Commission, William E. Long and Edwyna G. Anderson (Commissioners of the Michigan Public Service Commission).

Michigan Consolidated Gas Company
Michigan Gas Utilities Company

Appellees

Panhandle Eastern Pipe Line Company
National Steel Corporation

Amicus Curiae

Arkansas Public Service Commission
Associated Gas Distributors
Battle Creek Gas Company
Federal Energy Regulatory Commission
Michigan Gas Company
Public Service Commission of Wisconsin
Public Utilities Commission of Ohio
Southeastern Michigan Gas Company
United Distribution Companies

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OPINIONS BELOW

The opinion of the U.S. Court of Appeals for the Sixth Circuit ("Sixth Circuit") is reported as *Michigan Consolidated Gas Co., et al.* v. *Panhandle Eastern Pipe Line Co.*, 887 F.2d 1295 (6th Cir., 1989), and is reproduced in the Appendix at pages 1a-12a. The Sixth Circuit subsequently denied the joint petition for rehearing of the State of Michigan, Michigan Public Service Commission, William E. Long and Edwyna G. Anderson (collectively, "Michigan"), Michigan Consolidated Gas Company and Michigan Gas Utilities Company in an unreported order dated November 3, 1989. The judgment of the Sixth Circuit was issued as mandate on November 15, 1989. The Order Denying Rehearing and Judgment are reproduced

in the Appendix at pages 13a-15a and 16a-17a. Additionally, on March 30, 1989, in an unreported order, the Sixth Circuit had stayed the appeals pending the decision by the D.C. Circuit in *Michigan Consolidated Gas Co.* v. *Federal Energy Regulatory Comm.*, 883 F.2d 117 (D.C. Cir., 1989). That order is reproduced in the Appendix at pages 18a-20a.

The opinion and judgment of the United States District Court for the Western District of Michigan is reported as *National Steel Corp.* v. *Long.*, 689 F.Supp. 729 (W.D. Mich. 1988) and is reproduced in the Appendix at pages 21a-41a.

JURISDICTION

The judgment sought to be reviewed was entered by the Sixth Circuit on October 6, 1989 and its rehearing order was entered on November 3, 1989. Jurisdiction in this Court exists by certiorari pursuant to 28 U.S.C. § 1254(1). Jurisdiction in the Sixth Circuit below existed pursuant to 28 U.S.C. § 1291.

STATUTORY PROVISIONS INVOLVED

The statutory provisions involved are Section 1(b) and Section 7(c) of the Natural Gas Act ("NGA"), 15 U.S.C. § 717(b), 15 U.S.C. § 717f(c), and Sections 1 and 2 of Michigan Act 69 of the Public Acts of 1929 ("Act 69"), Mich. Comp. Laws 460.501 and 460.502. These provisions are set forth in the Appendix at pages 42a-44a.

STATEMENT OF THE CASE

This case demonstrates the accuracy of the proposition that history repeats itself. Nearly 40 years ago, Panhandle Eastern Pipe Line Company ("Panhandle") sought to construct local facilities to provide natural gas service directly to an industrial consumer in an industrial corridor near Detroit without first obtaining the approval of the Michigan Public Service Commission ("MPSC") pursuant to Act 69, Mich. Comp. Laws

460.501 *et seq.* Act 69, in essence, provides that before a utility may provide service in an area already being served by an existing utility, it must obtain a certificate of public convenience and necessity from the MPSC. Since the area in question was already being served by the Michigan Consolidated Gas Company ("Mich. Con"), the MPSC maintained that Panhandle was required to obtain an Act 69 certificate. The MPSC's position was vindicated by this Court in *Panhandle Eastern Pipe Line Co.* v. *Michigan Public Service Comm.* ("*Panhandle/Michigan*"), 341 U.S. 329 (1951), wherein this Court upheld Act 69's requirements.

In this case, Panhandle once again has sought to construct facilities and render natural gas service directly to an industrial consumer in the same industrial corridor near Detroit. The industrial consumer is again in an area already being served by Mich Con and again Panhandle seeks to render such service without obtaining an Act 69 certificate. Despite these similarities, the Sixth Circuit all but ignored *Panhandle/Michigan.*

In 1985, National Steel Corporation ("National"), Mich Con's second largest customer, entered into a contract with a producer to purchase natural gas from certain wells in Oklahoma. Later that same year, Panhandle and National entered into a contract whereby Panhandle agreed to transport the gas to National's steelmaking plant near Detroit. Rather than transporting this gas to Michigan on Panhandle's pipeline and then through Mich Con's existing facilities to National's plant, as in the past, Panhandle agreed to construct new facilities and provide natural gas directly to National.

Panhandle thereafter applied to the Federal Energy Regulatory Commission ("FERC") for a certificate pursuant to Section 7(c) of the NGA, 15 U.S.C. 717f(c), to transport gas from Oklahoma and to construct local fa-

cilities in Michigan to deliver the gas directly to National. Michigan intervened in the proceeding at FERC and affirmatively asserted its Act 69 jurisdiction, arguing that the FERC lacked jurisdiction to authorize the construction of local facilities in Michigan and the direct delivery of gas to National. Nevertheless, on September 10, 1987, the FERC authorized Panhandle to construct facilities and provide direct natural gas service to National. *Panhandle Eastern Pipe Line Co.*, 40 FERC (CCH) ¶ 61,219 (1987), Commissioner Stalon dissenting, 44 FERC ¶ 61,410 (1988).[1]

This case was initiated on September 14, 1987 by the filing of two separate lawsuits. The first was filed by Mich Con in the Wayne Circuit Court in Detroit, Michigan. In its action, Mich Con sought to enjoin Panhandle from directly delivering any natural gas to National because Panhandle had not obtained an Act 69 certificate from the MPSC. Inasmuch as Mich Con's action was based upon a state statute administered by the MPSC, Michigan sought and was granted intervention. Also, on September 14, 1987, Panhandle and National filed a second action, a petition for a declaratory judgment against the Commissioners of the MPSC in the U.S. District Court for the Western District of Michigan. Panhandle and National sought a judgment that the MPSC had no lawful jurisdiction over Panhandle's proposed direct na-

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[1] After FERC denied rehearing on January 26, 1988, *Panhandle Eastern Pipe Line Co.*, 42 FERC (CCH) ¶ 61,076 (1988), Commissioner Stalon dissenting 44 FERC (CCH) ¶ 61,424 (1988), Michigan petitioned the U.S. Court of Appeals for the District of Columbia Circuit for review of the FERC decisions. In an opinion dated August 18, 1989, the U.S. Court of Appeals for the District of Columbia Circuit upheld the FERC orders. *See Michigan Consolidated Gas Co.* v. *Federal Energy Regulatory Comm.*, 883 F.2d 117 (D.C. Cir., 1989). Michigan thereafter filed a Petition for Rehearing and Suggestion for Rehearing *En Banc*, both of which were denied in orders dated October 26, 1989. Michigan filed a Petition for Certiorari to the District of Columbia Circuit on January 24, 1990.

tural gas service to National. At no point did Panhandle apply to the MPSC for an Act 69 certificate.

Mich Con's Wayne County Circuit Court complaint was subsequently removed to the U.S. District Court where it was ultimately consolidated with Panhandle and National's lawsuit. The District Court, on November 2, 1987, issued a preliminary injunction enjoining Panhandle from delivering gas to National. However, in its subsequent opinion on the merits, the District Court held that Act 69 was preempted by the NGA, 15 USC §§ 717 *et seq.*, and, therefore, dissolved its earlier injunction and granted a declaratory judgment to Panhandle. *National Steel Corp.* v. *Long*, 689 F.Supp. 729 (W.D. Mich., 1988), Appendix at 21a-39a. Therefore, Michigan appealed that decision to the U.S. Court of Appeals for the Sixth Circuit.

The preemption issue was fully briefed and orally argued before the Sixth Circuit. Thereafter, on March 30, 1988, the Sixth Circuit issued an order deferring its decision on the preemption issues until the issuance by the D.C. Circuit of its decision on the FERC orders granting a certificate to Panhandle to directly serve National. Appendix at 18a-20a.

The arguments in the D.C. Circuit case upon review of the FERC orders did not involve the issues concerning the preemption of Act 69, but rather involved Michigan's argument that FERC's jurisdiction over interstate transportation of natural gas did not extend to the regulation of local distribution (including construction of local facilities and direct deliveries to consumers) in Michigan. The D.C. Circuit expressly notes that its decision relates to the FERC appeal and does not include issues concerning preemption, noting that the preemption issues rested before the Sixth Circuit. The D.C. Circuit stated:

> Transportation in interstate commerce is clearly a subject for federal regulation under 15 U.S.C. § 717 (b). To what extent this works a preemption of state

regulation is not the subject of the present petition for review, and we need not discuss it.[3]

[3] We express no opinion on the finding of preemption in *National Steel Corp.* v. *Long*, 689 F. Supp. 729, a matter which is presumably before the Sixth Circuit.

Michigan Consolidated Gas Co. v. *Federal Energy Regulatory Commission*, 883 F.2d 117, 122 (D.C. Cir. 1989).

The Sixth Circuit, in its subsequent decision in this case, never really reviewed Michigan's arguments that Act 69 was not preempted by the NGA. Instead, the Sixth Circuit merely incorporated the D.C. Circuit's finding that the transportation of gas to National and the construction of local facilities in Michigan was interstate transportation of natural gas over which FERC had jurisdiction. The Sixth Circuit proceeded to find that Act 69 was preempted without any analysis of Michigan's argument that the reservation of state authority over the local distribution of natural gas in Section 1(b) of the NGA, 15 U.S.C. § 717(b), precluded a finding that Act 69 conflicted with federal authority under the NGA.

The Sixth Circuit affirmed the District Court in an opinion dated October 6, 1989. *Michigan Consolidated Gas Co.* v. *Panhandle Eastern Pipe Line Co.*, 887 F.2d 1295 (6th Cir., 1989). Appendix at 1a-12a. Michigan, along with the other appellants, jointly sought rehearing which was denied by the Sixth Circuit in an unreported order issued November 3, 1989. Appendix at 13a-15a. The Sixth Circuit issued its mandate on November 15, 1989. Appendix at 16a.

REASONS FOR GRANTING THE WRIT

I. The Power To Regulate Bypass Presents An Important Question Of Federal Law Which Should Be Settled By This Court.

This case involves a jurisdictional dispute concerning federal and state law on the power to regulate the bypass of existing local distribution facilities by an interstate

pipeline company's construction of duplicative local facilities for the direct rendering of natural gas service to consumers in Michigan. Panhandle maintains that the FERC has such power pursuant to its Section 1(b) authority over the transportation of natural gas in interstate commerce. Michigan maintains, however, that Section 1(b) of the Natural Gas Act expressly forbids the FERC from the exercise of such power and instead reserves it to the States. This is a legal question having widespread national implications since the rates and rate designs adopted by state utility commissions for the general ratepaying public will be profoundly affected if FERC is allowed to authorize interstate pipelines to serve large industrial consumers, thereby bypassing state-regulated local distribution utilities. *See generally* Broadman & Kalt, *How Natural is Monopoly? The Case of Bypass in Natural Gas Distribution Markets*, 6 Yale J. on Reg. 181 (1989); MacAvoy, Spulber & Stangle, *Is Competitive Entry Free? Bypass and Partial Deregulation in Natural Gas Markets*, 6 Yale J. on Reg. 209 (1989). Accordingly, Michigan submits that this case is of major significance to national jurisprudence and warrants review by this Court.

II. The Sixth Circuit's Decision Below Violates The Natural Gas Act's Dual Regulatory Scheme And Congressional Intent That The Regulation Of The Local Distribution Of Natural Gas Be Retained By The States And Exempt From Federal Regulation.

The Sixth Circuit's fundamental and critical error is contained in a brief and unembellished passage, in which it concludes that the Panhandle-National bypass involves the interstate transportation of natural gas but does not involve the "local distribution" of natural gas, as defined in Section 1(b) of the NGA, 15 U.S.C. § 717(b):

> However, we agree with the district court, *National Steel Corp.*, 689 F.Supp. at 734-36, and the District of Columbia Circuit, *Michigan Consolidated Gas Co.*,

883 F.2d 117, 121-23, that the Panhandle-National Steel bypass "involves merely interstate transportation of natural gas" (which is subject to FERC jurisdiction) and not local distribution. In this case it is undisputed that the retail sale of natural gas occurs in Oklahoma, where National Steel purchases it for its use at its plant in Detroit. Thus,

> Panhandle's role under the arrangement is simply to transport National's gas from one state to another across several intervening states. It is hardly conceivable that a transaction could fit more neatly into the category of "transportation of natural gas in interstate commerce."

Michigan Consolidated Gas Co., 883 F.2d at 121 (Slip op. at 9-10).

Michigan Consolidated Gas Co. v. *Panhandle Eastern Pipe Line Co.*, 887 F.2d 1295, 1300. App. at 9a. The Sixth Circuit's opinion fails, however, to articulate the differences between the interstate transportation of natural gas and the local distribution of such gas. Nor does it explain how Panhandle's role of constructing local facilities in Michigan, to directly serve an end-user in Michigan which is already served by an existing state regulated local distribution utility, does not constitute local distribution.[2] Finally, it fails to indicate whether (and if so, why) a finding of interstate transportation by the court necessarily precludes a finding of "local distribution".[3]

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[2] *Panhandle/Michigan*, 341 U.S. at 333-34, unequivocally determines that tie-in facilities such as those between Panhandle and National are "local facilities". Indeed, the only purpose of such facilities is to accomplish the local, direct delivery of gas to the consumer.

[3] Indeed, both may exist simultaneously since it is clear that if Panhandle were selling gas to National it would be required to obtain both FERC certification to transport the gas interstate *and* MPSC certification to construct facilities and deliver the gas to National. *See, Panhandle/Michigan*, 341 U.S. 329 (1951). Similarly, it is plainly the case that during the time between the Supreme

The Sixth Circuit's decision fundamentally shifts the NGA's division of state and federal authority over natural gas distribution in a manner inconsistent with the NGA's dual regulatory scheme. It ignores Congress' express mandate in Section 1(b) of the NGA that the local distribution of natural gas is to continue being subject to state regulation and exempt from federal regulation. Although Section 1(b) vests FERC with regulatory authority over the transportation of natural gas in interstate commerce, such authority is strictly limited by the proviso in Section 1(b) of the NGA. Section 1(b) expressly provides that FERC's jurisdiction:

> ". . . shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution . . ."

The Sixth Circuit's interpretation of the NGA also violates this Court's determination that the NGA "[t]ook no authority from state commissions". *FPC* v. *Panhandle Eastern Pipe Line Co.*, 337 U.S. 498, 510 n.15 (1949) The Sixth Circuit's decision diminishes the MPSC's regulatory power, making it less capable of regulation than it would have been before the NGA's enactments in 1938. Prior to 1938, local deliveries to consumers were consistently held to be subject to state regulation.[4] *Missouri* v. *Kansas Gas Co.*, 265 U.S. 298, 307-309 (1924); *Pennsylvania Gas Co.* v. *Public Service Comm.*, 252 U.S. 23, 30-31 (1920); *Public Utilities Comm.* v. *Landon*, 249 U.S. 236, 245-246 (1919).

This Court has recognized that it would be exceedingly incongruous for federal regulators to encroach on pre-

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Court's decision in *FPC* v. *East Ohio Gas Co.*, 338 U.S. 464 (1950) and the Hinshaw Amendment, Pub. L. No. 68-323, 68 Stat. 36, codified as Section 1(c) of the NGA, 15 U.S.C. § 717(c), *both* state *and* federal jurisdiction attached to the transportation facilities of local distribution companies. *See, e.g., Texas Illinois Natural Gas Pipeline Co.*, 10 F.P.C. 235 (1951).

[4] Act 69 was passed in 1929, eight years prior to the NGA.

existing state authority in the guise of exercising NGA powers:

> It would be an exceedingly incongruous result if a statute so motivated, designed and shaped to bring about more effective regulation, and particularly more effective state regulation, were construed in the teeth of those objects, and the import of its wording as well, to cut down regulatory power and to do so in a manner making the states less capable of regulation than before the statute's adoption.

Panhandle Eastern Pipe Line Co. v. *Public Service Comm. of Indiana* ("Panhandle/Indiana"), 332 U.S. 507, 519 (1947). Yet, Congress, intent to preserve state jurisdiction is swept aside by the Sixth Circuit's conclusion that bypass was wholly within FERC's jurisdiction, thereby allowing federal regulation of local distribution, in contravention of Section 1(b) of the NGA and Michigan Act 69.

Finally, it is clear that the Sixth Circuit heavily relied upon the D.C. Circuit's August 18, 1989 decision in *Michigan Consolidated Gas Co.* v. *Federal Energy Regulatory Comm.*, 823 F.2d 117 (D.C. Cir. 1989), from which Michigan also has filed a Petition of Certiorari. The irony of this reliance, however, is that the D.C. Circuit never even discussed the issue of local distribution. The D.C. Circuit's decision prejudices what clearly are substantial local interests by creating an untenable distinction between natural gas service directly to a consumer when accomplished by a pipeline company *sale*, as it was in this Court's 1951 *Panhandle/Michigan* decision [5], and

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[5] In *Panhandle/Michigan*, this Court upheld Michigan's Act 69 certificating requirements, finding that the NGA did not cover direct sales by interstate pipelines. An integral component of this Court's decision was the emphasis placed on local interests, a factor critical to *both* Commerce Clause and NGA analyses:

> Thus, not only would there be two utilities using local facilities to accommodate their distribution systems, but they would be seeking to serve the same industrial consumers. Appellant

direct natural gas service directly to a consumer when accomplished by a pipeline company *transportation.* In terms of local interests, however, this is distinction without a difference since the local interests related to direct service to an end-user and the construction of duplicative local facilities with respect to a "sale" bypass are precisely the same as with respect to a "transportation" bypass. Such a distinction contradicts Congress' goal in the NGA to bring about more effective local regulation. *Panhandle/Indiana,* 332 U.S. at 519. Moreover, the local control of "essentially local interests" which this Court so carefully sought to preserve in its 1951 *Panhandle/Michigan* decision becomes a fiction as a result of the Sixth Circuit's decision below.

III. The Sixth Circuit's Opinion Erroneously Employs A Pre-Emption Analysis That Is Inconsistent With The Anti-Preemption Provision Of Section 1(b) Of The NGA.

The Sixth Circuit's opinion that the NGA preempts the MPSC's regulation over the local distribution involved in

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asserts a right to compete for the cream of the volume business without regard to the local public convenience or necessity. Were appellant successful in this venture, it would no doubt be reflected adversely in Consolidated's overall costs of service and its rates to customers whose only source of supply is Consolidated. This clearly presents a situation of 'essentially local' concern and of vital interest to the State of Michigan.

341 U.S. 333-334. The *Panhandle/Michigan* Court then concluded:

It does not follow that because appellant is engaged in interstate commerce it is free from state regulation or free to manage essentially local aspects of its business as it pleases. The course of this Court's decisions recognizes no such license. [citations omitted]. Such a course would not accomplish the effective dual regulation Congress intended, and would permit appellant to prejudice substantial local interests. This is not compelled by the Natural Gas Act or the Commerce Clause of the Constitution.

Id. at 337.

this case also results from its misapplication of this Court's preemption caselaw. The Sixth Circuit struck down Act 69 as applied, in large part, because of a perceived conflict between MPSC regulation and the NGA's comprehensive regulatory scheme. See Appendix at pages 9a-12a.

This Court, however, has held that the existence of a "comprehensive" federal regulatory scheme, by itself, does not support the view that federal law preempts state law. *New York Dept. of Social Services* v. *Dublino*, 413 U.S. 405, 414-415 (1973); *Pacific Gas & Electric Co.* v. *State Energy Resources Comm.*, 461 U.S. 190, 205 (1983). When conducting a preemption inquiry, the proper focus is on Congress' intent and not the "comprehensive" nature of regulation. *Id.* As a result, if Congress inserts an anti-preemption provision, i.e., a provision preserving state jurisdiction, as it did in Section 1(b) of the NGA, the "comprehensive" nature of federal regulation is considerably less important than where Congress comprehensively regulates an area without expressly limiting federal authority. With respect to the anti-preemption provision at issue in this case, this Court recently noted that "Congress went so far in Section 1(b) of the NGA, 15 U.S.C. § 717(b), as to prescribe not only 'the intended reach of the [federal] power but also [to] specif[y] the areas in which this power was not to extend.'" *See, Northwest Central Pipeline Corp.* v. *State Corp. Comm. of Kansas*, —— U.S. ——, 109 S.Ct. 1262, 1274 (1989).

In cases involving an anti-preemption provision, it is neither necessary nor appropriate to determine whether state law "conflicts" with federal law since Congress has already delineated state and federal jurisdictions through the adoption of an anti-preemption provision. Therefore, the key determinant is the meaning of the anti-preemption provision itself. *See, California Federal Savings & Loan Ass'n* v. *Guerra*, 479 U.S. 272, 282-84 (1987). Moreover, it is clear that neither the Sixth Circuit nor the

D.C. Circuit, upon which the Sixth Circuit relies, provided any reasoned analysis why the direct service by Panhandle to National, and the construction of duplicative local facilities in Michigan, did not constitute "local distribution", which the NGA expressly forbids the federal government from regulating. This failure constitutes a fatal flaw in the Sixth Circuit's preemption analysis.[6]

It was precisely because Congress had explicitly denied the Federal Communications Commission certain subject matter jurisdiction that this Court in *Louisiana Public Service Comm.* v. *Federal Communications Comm.*, 476 U.S. 355 (1976), struck down a federal regulation which crossed-over into an area of regulation which Congress reserved to the States. As this Court stated, "a federal agency may preempt state law only when and if it is acting within the scope of its congressionally delegated authority" because "an agency literally has no power to act, let alone pre-empt the validly enacted legislation of a sovereign state, unless and until Congress confers power upon it," and further, that "an agency may not confer upon itself power . . . [t]o permit an agency to expand its power in the face of a congressional

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[6] In the treatise *American Constitutional Law*, Professor Tribe notes:

> The governing federal statute may, however, restrict its own preemptive effect— . . . When this is the case, it seems quite improper for a court even to *ask* whether a challenged state law which clearly purports to require or permit no such thing nonetheless 'conflicts' in some more nebulous sense with the federal statute or its objectives. To engage in such a broader inquiry is to forget that preemption is ultimately a matter of *construing* a federal statute; when the statute contains its own preemption or anti-preemption provision, a court that fails to give that provision dispositive effect and instead applies its own preemption criteria is illegitimately disregarding the source of its authority and, regardless of where its preemption inquiry leads it, is pursuing a fundamentally lawless path.

Tribe, *American Constitutional Law*, Second Edition, page 482, n. 8 (emphasis in original).

limitation on its jurisdiction would be to grant to the agency power to override Congress." *Id.* at 374.

For this reason, the Sixth Circuit's reliance on *Schneidewind* v. *ANR Pipeline Co.*, 485 U.S. 293 (1988), is misplaced. *Schneidewind* involved the question of whether the FERC had the authority to regulate the issuance of securities by interstate pipeline companies. As this Court noted in *Schneidewind*, although the NGA gave the FERC substantial powers, it did not expressly authorize the FERC to regulate the issuance of such securities. Faced with this situation, this Court therefore decided the issue on the basis of an implied preemption. In this case, the Sixth Circuit, citing *Schneidewind*, found that a conflict would exist were the MPSC to deny Panhandle's request for direct service and construction of local facilities for an end-user in Michigan. Appendix at 11a. The difficulty with the Sixth Circuit's finding, however, is that unlike *Schneidewind*, this case involves the operation of an express anti-preemption provision in the NGA, under which "local distribution" is not subject to federal regulation, but remains subject to state authority.

Regardless of whether a conflict preemption analysis is applied, Michigan's Act 69 is valid. As this Court recognized in *Northwest Pipeline*, *supra*, there is a Congressionally designed interplay between state and federal regulation under the NGA. 109 S.Ct. at 1278. This Court held, however, that where a state law impacts on matters within FERC's control, the state's purpose must be to regulate matters which are subjects of state jurisdiction, and the means chosen must be at least plausibly related to matters of legitimate state concern. *Id.*

In this case, Act 69 has a proper state purpose. Act 69 applies to the local distribution of natural gas to the consumer. Indeed, its primary purpose is to ensure that the local public convenience and necessity is considered with respect to the construction of duplicative local facili-

ties and the rendering of direct local service to an end-user in Michigan. Long before this dispute arose, the Michigan Supreme Court held that Act 69's purpose was to prevent the unnecessary multiplication of companies serving the same territory, to avoid wasteful duplication of facilities so as to keep investment at the lowest figure consistent with satisfactory service. *Huron-Portland Cement Co.* v. *Michigan Public Service Comm.*, 351 Mich. 255; 88 N.W.2d 492 (1958). Moreover, Act 69 was enacted in 1929, eight years prior to the NGA. Accordingly, it is manifestly clear that Act 69 was not designed to interfere with policies established in the NGA.

It is also important to remember what Act 69 regulates. It regulates, *inter alia*, the delivery or furnishing of gas to or for the public for compensation, and the construction of local facilities for such purpose. Act 69 is not dependent upon a sale occurring. *See* Mich. Comp. Laws 460.501. Thus, it is aimed at regulating all activities that result in the local distribution of gas to the ultimate consumer.

The Sixth Circuit found a conflict between the NGA and Act 69 saying that Michigan's effort to regulate Panhandle was *simultaneous* with FERC regulation rather than being *sequential*. Appendix at 11a. But this conclusion was based on the incorrect belief that Panhandle's construction of facilities and delivery of gas directly to the consumer, National, did not constitute local distribution. The local construction of facilities and direct delivery of gas to National, however, are severable activities from the interstate transportation of natural gas. To treat them otherwise ignores the express limitation of FERC's powers under Section 1(b) of the NGA.

Northwest Pipeline, *supra*, supports this analysis. In *Northwest Pipeline*, this Court was confronted with a Kansas regulation pertaining to gas production. Since the regulation was aimed primarily at producers and

since Section 1(b) excluded the production and gathering of natural gas from FERC jurisdiction, the Kansas regulation was held not to be preempted by the NGA. 109 S.Ct. at 1276-79. If, however, a single company performed both as a producer of gas in Kansas and as an interstate pipeline transporting that gas in interstate commerce, would the nature of that company's entire activities make its production activities any less subject to Kansas' regulation with respect to local production? Michigan thinks not. Similarly in this case, Panhandle's identity as an interstate pipeline company should not cloud this Court's view of what Panhandle is actually doing when it constructs local facilities in Michigan to provide natural gas directly to a consumer, thereby bypassing and duplicating existing local facilities and services. Simply stated, Panhandle has become a local distribution utility and should be subject to Act 69 state regulation just as all other local utilities are. To permit any other result would be to unravel the preservation of state jurisdiction which the 75th Congress carefully wove into the NGA.

Finally, there factually can be no conflict between Michigan's Act 69 regulation of local distribution and FERC's power to regulate interstate transportation. This is because National, prior to and during this case, was fully able to transport gas from the producers to its plant over existing interstate pipeline and local distribution facilities, including Panhandle's facilities which were already interconnected with the local utility, Mich Con, which in turn interconnected with National.[7] The rates

[7] It should be noted that, historically, pipeline companies such as Panhandle would purchase gas at the "wellhead" from numerous producers and then transport the commingled gas and then resell it at wholesale to local distribution companies such as Mich Con, which would in turn sell and deliver the gas to the ultimate consumer. This was the structure in place in 1950 when *Panhandle/Michigan* was decided. Beginning with the decline in oil prices relative to gas prices in the early 1980's, significant changes began

for such transportation services are duly set by contested case procedures at FERC, with respect to the Panhandle portion of the transportation, and by the MPSC relative to the intrastate utility portion of the transportation service. Michigan's Act 69 (as affirmed by this Court in the 1951 *Panhandle/Michigan* in similar circumstances) would have provided the MPSC the opportunity to determine whether the construction of the duplicative local facilities and the provision of direct services by Panhandle to National was consistent with the local public convenience and necessity. As applied to this transaction, the Sixth Circuit's decision below obliterates state jurisdiction over local distribution and the construction of local facilities for that purpose, in contravention of both Michigan's Act 69 and Congress' express preservation of such state authority in Section 1(b) of the NGA.

PRAYER FOR RELIEF

WHEREFORE, this Court should grant certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit and should hold that Michigan's Act 69 is not preempted by the Federal Natural Gas Act.

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to occur at the federal level in the gas industry. One aspect of this change has been the "unbundling" or separation of the pipeline company's merchant function (that of being a seller of natural gas) from its transmission function (that of being a transporter of natural gas). The same unbundling of service is available in Michigan on the local utilities system, at sales or transportation rates set by the MPSC. Thus, with unbundling, large volume consumers may arrange to purchase gas directly from the producers and have it transported by a pipeline company and the local utility. In such circumstances, the pipeline company and utility never own the gas which they are transporting, and the rates for such transportation service are set by the FERC relative to the interstate pipeline portion of the service and by the MPSC relative to the intrastate utility portion of the service.

Respectfully submitted,

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Dated: January 24, 1990

APPENDIX

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Nos. 88-1650, 88-1680, 88-1774, 88-1858

MICHIGAN CONSOLIDATED GAS COMPANY, *et al.*
Plaintiffs-Appellants,
(88-1650, 88-1680 & 88-1858),

v.

PANHANDLE EASTERN PIPE LINE COMPANY,
Defendants-Appellees.

NATIONAL STEEL CORPORATION AND PANHANDLE EASTERN PIPE LINE COMPANY,
Plaintiffs-Appellees,
(88-1774),

v.

WILLIAM E. LONG AND EDWYNA G. ANDERSON,
Defendants-Appellants.

On Appeal from the United States District Court
for the Western District of Michigan

Decided and Filed October 6, 1989

Before: MERRITT, Chief Judge, MILBURN, Circuit Judge, and LIVELY, Senior Circuit Judge.

MILBURN, Circuit Judge. In these consolidated actions, appellants Michigan Consolidated Gas Company ("MichCon"); Michigan Gas Utilities Company ("MGU"); the State of Michigan; the Michigan Public Service Commission ("MPSC"); and William E. Long and Edwyna G. Anderson appeal the summary judgment granted against them by the district court on the ground that Michigan's authority to regulate the interstate transportation of natural gas in this "bypass" of a local distribution company is preempted by federal law. For the reasons that follow, we affirm.

I.

A.

Appellants MichCon and MGU are Michigan corporations that provide natural gas and related services, such as storage and transportation, in Michigan. Appellant MPSC is the state agency that regulates public utilities in Michigan, and appellants William E. Long and Edwyna G. Anderson were Commission members when these consolidated actions were filed in the district court.

Appellee Panhandle Eastern Pipe Line Company is an interstate pipeline company. Like MichCon and MGU, it is a "natural gas company" within the meaning of the Natural Gas Act of 1938, 15 U.S.C. § 717a(6) ("the Act"). Panhandle therefore falls within the regulatory reach of the Federal Energy Regulatory Commission ("FERC") as well as, under certain circumstances, the MPSC.

Panhandle has supplied MichCon and other Michigan utilities with natural gas for more than fifty years. The Panhandle pipeline involved in this case runs from the State of Texas through Michigan and happens to cross through the industrial area of the City of Detroit, where

appellee National Steel Corporation's ("National Steel") Great Lakes Steel Division plant is located. National Steel is an integrated steelmaker and was MichCon's second largest customer until July 1988, when it tapped directly into the Panhandle pipeline.

This case involves the "bypass" or direct transportation of natural gas from the wellhead in the State of Oklahoma to the ultimate consumer in Michigan. For many years, pipeline companies purchased natural gas at the wellhead from natural gas producers, transported it through pipelines, and then resold it at wholesale to local distribution companies ("LDCs"), such as MichCon and MGU. Producers sold natural gas in the interstate market under federal certificates at federally regulated prices. Interstate pipelines bought, transported, and sold natural gas under federal certificates at federally regulated prices. The LDCs resold natural gas at retail to ultimate consumers (sales to the "burner tip") under state certificates at state regulated prices. *See Associated Gas Distrib. v. FERC*, 824 F.2d 981, 993-97 (D.C. Cir. 1987), *cert. denied*, —— U.S. ——, 108 S. Ct. 1468 (1988); *Public Serv. Comm'n v. FERC*, 610 F.2d 439, 441 (6th Cir. 1979).

In 1978, Congress adopted the Natural Gas Policy Act, 15 U.S.C. §§ 3301-3432, which reduced the FERC's discretion in controlling natural gas prices at the wellhead, eliminated many licensing requirements, and facilitated competition in interstate and intrastate markets. Then, in the early 1980s, supplies of oil and natural gas surged and prices dropped. These developments prompted fundamental changes in the natural gas industry. Of particular relevance to this case was the "unbundling" of the pipelines' functions as wholesalers and transporters of natural gas.

Today, instead of buying from pipeline companies, LDCs and large consumers often buy natural gas at the

wellhead directly from producers and then hire pipeline companies to transport it to LDCs, which distribute the natural gas to the burner tips. National Steel, for example, began purchasing natural gas directly from wellhead sources in Oklahoma and Louisiana in 1986, and hired pipelines to transport the natural gas to Michigan. The pipelines then delivered National Steel's natural gas to MichCon. Panhandle, for example, charged approximately 41 cents per 1,000 cubic feet of natural gas for transportation *over many hundreds of miles.* MichCon then transported the natural gas about five miles to the Great Lakes Steel Division, a service for which it charged approximately 80 cents per 1,000 cubic feet.

In September 1985, Panhandle agreed to add fittings and pipes to permit National Steel to tap its pipeline at the Great Lakes Steel Division. The agreement provided that National Steel would purchase natural gas in Oklahoma and hire Panhandle to transport the natural gas directly to its steel mill in Detroit, bypassing the MichCon local network and the higher transportation rates authorized by the MPSC for natural gas transported on MichCon's system. National Steel claims that the bypass will save it approximately $10 million annually in energy costs and that such savings are necessary if it is to remain competitive with foreign steelmakers. It further claims that if this bypass is disallowed, it will turn to another energy source rather than resume purchasing natural gas from MichCon.

MichCon and the other appellants counter that if this bypass stands, it will have a devastating impact on the State of Michigan's utility structure and, ultimately, its economy. They depict Panhandle's agreement as "market raiding" and "cream skimming," and warn that it sets the precedent for sweetheart deals with Michigan's other large natural gas consumers, which will result in massive cost shifting that will leave small businesses and individual consumers as the sole support for the state's utilities network.

B.

On December 12, 1985, Panhandle applied to the FERC for a certificate of public convenience and necessity under section 7(c) of the Act, 15 U.S.C. § 717f(c), authorizing the bypass and construction of the facilities necessary to connect it. On January 27, 1987, after conducting hearings on the matter, an FERC Administrative Law Judge recommended approving Panhandle's application. MichCon and the MPSC filed exceptions, but in a decision issued September 10, 1987, the FERC adopted the ALJ's recommendation and authorized the bypass and all necessary construction. MichCon and the MPSC petitioned for judicial review of FERC's decision, arguing that it had exceeded its jurisdiction and incorrectly construed section 7(c). On August 18, 1989, the United States Court of Appeals for the District of Columbia Circuit denied the petition for review and upheld the FERC's authorization of the bypass, holding that the bypass "involves merely interstate transportation of natural gas," and not local distribution. *Michigan Consol. Gas Co. v. FERC*, No. 88-1062 and consolidated cases (D.C. Cir. August 18, 1989).

Meanwhile, on July 30, 1987, while Panhandle's application was still pending before the FERC, MichCon filed a formal complaint against the pipeline company with the MPSC. On September 14, 1987, four days after the FERC authorized the bypass, Panhandle and National Steel filed an action in the United States District Court for the Western District of Michigan, arguing that by entertaining MichCon's complaint, the MPSC was interfering with the exclusive jurisdiction of FERC over the interstate transportation of gas. Panhandle and National Steel sought declaratory relief and an injunction prohibiting the alleged interference.

MichCon responded by filing an action in the Wayne County, Michigan, Circuit Court the next day. MichCon sought injunctive relief in its state action, claiming that

Panhandle's FERC certificate was insufficient authority for the bypass and that Panhandle would violate Michigan law by delivering gas to National Steel without MPSC approval. The State of Michigan, the MPSC, and MGU intervened as plaintiffs, and National Steel intervened as a defendant. Panhandle then removed MichCon's state case to the district court, where it was consolidated with Panhandle's pending action.

On September 29, 1987, the MPSC issued an order that prohibited Panhandle from constructing the bypass connections and delivering gas to National Steel until it found the proposed service to be in the public interest. The MPSC then scheduled hearings on the matter.

On November 2, 1987, the district court issued a preliminary injunction enjoining Panhandle from delivering gas to National Steel, but it did not enjoin the construction of the bypass connections. The district court then tried the consolidated cases on stipulated evidence, briefs, and oral argument. In its decision issued June 16, 1988, and reported at *National Steel Corp. v. Long*, 689 F. Supp. 729 (W.D. Mich. 1988), the district court found the bypass did not constitute "local distribution" as defined by the Act, dissolved the injunction, and held that the Act preempted application of Michigan law to the FERC-certificated bypass. MichCon, MGU, the State of Michigan, the MPSC, William Long and Edwyna Anderson filed timely notices of appeal to this court in late June and early July 1988. As Panhandle had completed its construction work during the course of litigation in the district court, it connected the bypass and began delivering gas to National Steel on July 1, 1988.

The primary issues raised in these consolidated appeals are: (1) whether the Panhandle-National Steel bypass constitutes "local distribution" of gas within the meaning of the Act; and (2) whether the MPSC can exercise jurisdiction over the bypass.

II.

A.

These consolidated appeals present a case of first impression in this circuit; *viz.*, the application of the Natural Gas Act ("the Act") to bypass transportation of natural gas in interstate commerce and the issue of federal preemption by the Act of state regulation in such a situation—questions of law which are subject to *de novo* review upon appeal. *See Pullman-Standard v. Swint*, 456 U.S. 273, 287-88 (1982). It is uncontested that the Act applies in this case, as "[g]as crossing a state line at any stage of its movement to the ultimate consumer is in interstate commerce during the entire journey." *Maryland v. Louisiana*, 451 U.S. 725, 755 (1981). However, in resolving the issues in this case, a review of the language and policies of the Act is appropriate.

By 1938, in a series of Commerce Clause cases, the Supreme Court established that states could regulate the intrastate and interstate transportation and sale of natural gas to ultimate consumers, but they could not reach indirect sales for resale, such as a pipeline's sale to an LDC for resale. *See Schneidewind v. ANR Pipe Line Co.*, 108 S. Ct. 1145, 1151 (1988); *Panhandle Eastern Pipe Line Co. v. Public Serv. Comm'n of Indiana* ("*Panhandle/Indiana*"), 332 U.S. 507, 514-15 (1947). The states' inability to regulate wholesale natural gas transactions handicapped their ability to regulate the natural gas industry and left consumers at the mercy of producers and pipeline companies. *See Panhandle/Indiana*, 332 U.S. at 515-16. Congress responded with the Act, "a comprehensive scheme of federal regulation of 'all wholesales of gas in interstate commerce. . . .'" *Northern Nat. Gas Co. v. State Corp. Comm'n*, 371 U.S. 84, 91 (1963) (quoting *Phillips Pet. Co. v. Wisconsin*, 347 U.S. 672, 682 (1954)).

Through the Act, Congress delegated to the Federal Power Commission (now the FERC) "exclusive jurisdic-

tion over the transportation and sale of gas in interstate commerce for resale." *Schneidewind*, 108 S.Ct. at 1151. The Act was drawn very meticulously and has been interpreted narrowly to affect only those areas that were outside of the states' regulatory reach at the time it was passed. *See id.* at 1153; *Panhandle/Indiana*, 332 U.S. at 516-17; *Federal Power Comm'n v. Hope Nat. Gas Co.*, 320 U.S. 591, 610 (1944). The three things Congress specifically intended to draw within its regulatory power in the Act were (1) the interstate transportation of natural gas; (2) wholesale natural gas transactions in interstate commerce; and (3) natural gas companies engaged in interstate transportation or wholesale sales *Panhandle/Indiana*, 332 U.S. at 516. The result is that "[t]he natural gas industry is subject to interlocking regulation by both federal and state authorities." *Northwest Cent. Pipeline Corp. v. State Corp. Comm'n of Kansas*, 109 S. Ct. 1262, 1271 (1989).

B.

The Act specifically excludes "the local distribution of natural gas" from FERC jurisdiction.[1] In this case, the appellants argue that the FERC did not have jurisdiction over the Panhandle-National Steel bypass because it amounted to the "local distribution of natural gas," which is not permitted in Michigan without MPSC approval.

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[1] The pertinent section of the Act relevant to this appeal is section 1(b) of the Act, 15 U.S.C. § 717(b), which provides:

> The provisions of this chapter shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, *but shall not apply* to any other transportation or sale of natural gas or *to the local distribution of natural gas* or to the facilities used for such distribution or to the production or gathering of natural gas. (Emphasis supplied).

See M.C.L.A. §§ 460.501.506. However, we agree with the district court, *National Steel Corp.*, 689 F. Supp. at 734-36, and the District of Columbia Circuit, *Michigan Consol. Gas Co.*, —— F.2d —— (slip op. at 9-11), that the Panhandle-National Steel bypass "involves merely interstate transportation of natural gas" (which is subject to FERC jurisdiction) and not local distribution. In this case it is undisputed that the retail sale of natural gas occurs in Oklahoma, where National Steel purchases it for its use at its plant in Detroit. Thus,

> Panhandle's role under the arrangement is simply to transport National's gas from one state to another across several intervening states. It is hardly conceivable that a transaction could fit more neatly into the category of "transportation of natural gas in interstate commerce."

Michigan Consol. Gas Co., —— F.2d —— (slip op. at 9-10).

In agreeing with his conclusion, we decline the appellants' implied invitation to enlarge the exceptions for state jurisdiction in section 1(b) of the Act to include their "functional equivalents." Given the careful and continuing attention that Congress has focused on the natural gas industry, we are of the view that if Congress had intended to except the "functional equivalent" of "local distribution" from federal jurisdiction, it would have stated so by now.[2]

C.

Having rejected the appellants' contention that this case falls within the "local distribution exception" to the Act, and having determined that the bypass lies within

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[2] We also note, as did the Court of Appeals in the District of Columbia, that we decide this matter without considering the level of deference that is due to an agency's determination that it has jurisdiction under the statute it enforces. *See Michigan Consol. Gas Co.*, —— F.2d —— (slip op. at 11 n.3).

FERC's jurisdiction, it remains for us to determine whether the state's ability to regulate the bypass has been preempted. Congressional power to preempt state law originates in the Supremacy Clause of Article VI of The Constitution of the United States. *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 368 (1986). Preemption may be express or implied, but in either case, the question is one of congressional intent. *California Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272, ——, 107 S. Ct. 683, 689 (1987). As the Act does not expressly mention preemption of state law in the case of bypass transportation, we turn to the question of implied preemption:

> In the absence of explicit statutory language, however, Congress implicitly may indicate an intent to occupy a given field to the exclusion of state law. Such a purpose properly may be inferred [1] where the pervasiveness of the federal regulation precludes supplementation by the States, [2] where the federal interest in the field is sufficiently dominant, or [3] where "the object sought to be obtained by the federal law and the character of obligations imposed by it . . . reveal the same purpose." [citations omitted] Finally, even where Congress has not entirely displaced state regulation in a particular field, [4] state law is preempted when it actually conflicts with federal law. Such a conflict will be found "'when it is impossible to comply with both state and federal law, [citations omitted], or where the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress.'"

Schneidewind, supra, 108 S. Ct. at 1150-51.

Where a preemption question involves the Act, we bear in mind that with "unusual legislative precision," *Panhandle/Indiana*, 332 U.S. at 517, Congress extended

federal jurisdiction only to "the field of matters relating to wholesale sales and transportation of natural gas in interstate commerce." *Schneidewind*, 108 S. Ct. at 1153. We also are mindful that "every state statute that has some indirect effect on rates and facilities of natural gas companies is not pre-empted." *Id.* at 1155.

We recognize that the Act contains a meticulously drawn statement of federal jurisdiction with the intent of creating when the Act was enacted. Thus, we believe that in establishing a comprehensive regulatory network, Congress intended to occupy a field which the states could not reach. Similarly, to allow the MPSC to regulate the bypass in this case would obstruct the execution of the *complementary* relationship between state and federal regulation established by the Act. Were we to permit the MPSC to cancel the FERC's approval of the Panhandle-National Steel bypass, we would subordinate federal regulatory power to state regulatory power in the complete absence of authority to do so.

The appellants further argue that the Act provides for several areas in which state and federal regulatory commissions have dual jurisdiction. However, the cases and situations they cite involve *sequential* jurisdiction, such as federal jurisdiction over the interstate transportation of gas from the well-head to the LDC, and state regulation from the LDC to the burner tip. In this case, where Panhandle is not engaged in local distribution, but in the direct interstate transportation and delivery of natural gas, the dual jurisdiction MichCon and the other appellants seek is not sequential but simultaneous. Moreover, we find nothing in the Act nor in relevant case law that contemplates or supports the notion of simultaneous state and federal regulations of the interstate transportation of natural gas. Therefore, as the Supreme Court held that there was no room within the federal domain to allow the MPSC to regulate the issuance of long-term securities by gas companies in *Schneidewind*,

we are of the view that the MPSC may not regulate Panhandle's interstate transportation of natural gas.

III.

For the foregoing reasons, we conclude that the Panhandle-National Steel bypass involves only the interstate transportation of natural gas, and that the Act preempts MPSC regulation over the bypass. Therefore, the summary judgment of the district court is AFFIRMED.[3]

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[3] There is no claim here that the court should abstain from deciding this case under the principles articulated in *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943); *Younger v. Harris*, 410 U.S. 37 (1971); *Ohio Civil Rights Comm'n v. Dayton Christian Schools, Inc.*, 477 U.S. 619 (1986); *New Orleans Public Service, Inc. v. Council of City of New Orleans*, 109 S. Ct. 2506 (1989), and *CSXT, Inc. v. Pitz*, Nos. 88-1629/1642, August 22, 1989. Therefore, the court has no occasion to address the issue of abstention by a federal court in favor of state administrative proceedings.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 88-1650/1680/1774/1858

MICHIGAN CONSOLIDATED GAS COMPANY,
Plaintiff-Appellant (88-1650)
Plaintiff (88-1680)

STATE OF MICHIGAN, *et al.*,
Intervening Plaintiffs

MICHIGAN GAS UTILITIES COMPANY,
Intervenor-Appellant (88-1680)

vs.

PANHANDLE EASTERN PIPE LINE COMPANY,
Defendant-Appellee

NATIONAL STEEL CORPORATION,
Intervening Defendant-Appellee

NATIONAL STEEL CORPORATION, *et al.*,
Plaintiffs-Appellees (88-1774)
Plaintiffs (88-1858)

vs.

WILLIAM E. LONG, *et al.*,
Defendants-Appellants (88-1774)
Defendants (88-1858)

MICHIGAN GAS UTILITIES COMPANY,
Intervening Defendant

MICHIGAN CONSOLIDATED GAS COMPANY,
Plaintiff

STATE OF MICHIGAN, *et al.*,
Intervening Plaintiffs (88-1774)
Intervening Plaintiff-Appellants
(88-1858)

MICHIGAN GAS UTILITIES COMPANY,
Intervening Plaintiff

vs.

PANHANDLE EASTERN PIPE LINE COMPANY,
Defendant (88-1774)
Defendant-Appellee (88-1858)

NATIONAL STEEL CORPORATION,
Intervening Defendant (88-1774)
Intervening Defendant-Appellee
(88-1858)

Before: MERRITT, Chief Judge and MILBURN, Circuit Judge; LIVELY, Senior Circuit Judge

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ORDER

[Filed Nov. 3, 1989]

This matter is before the court upon consideration of the petition for rehearing by appellants Michigan Consolidated Gas Company, Michigan Gas Utilities Company, State of Michigan, Michigan Public Service Commission, William E. Long and Edwyna G. Anderson of this court's October 6, 1989 opinion affirming the decision of the district court.

Having carefully examined the petition and the record, this court finds it misapprehended no question of law or fact in its October 6, 1989 order.

It is therefore ORDERED that the petition for rehearing be, and it hereby is, denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
LEONARD GREEN
Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NOS. 88-1650/1680
88-1774/1858

MICHIGAN CONSOLIDATED GAS COMPANY,
Plaintiff-Appellant
(88-1650),

MICHIGAN GAS UTILITIES COMPANY,
Intervenor-Appellant
(88-1680),

STATE OF MICHIGAN; MICHIGAN PUBLIC SERVICE COMMISSION,
Intervening Plaintiff-Appellant
(88-1858),

v.

PANHANDLE EASTERN PIPE LINE COMPANY,
a Delaware corporation,
Defendant-Appellee
(88-1650/1680/1858),

NATIONAL STEEL CORPORATION,
Intervening Defendant-Appellee,
(88-1650/1680/1858),
Plaintiff-Appellee
(88-1774),

WILLIAM E. LONG; EDWYNA G. ANDERSON,
Defendants-Appellants
(88-1774).

Before: MERRITT, Chief Judge; MILBURN, Circuit Judge; and LIVELY, Senior Circuit Judge.

JUDGMENT

[Filed Oct. 6, 1989]

ON APPEAL from the United States District Court for the Western District of Michigan.

THIS CAUSE came on to be heard on the records from the said district court and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this court that the judgment of the said district court in this case be and the same is hereby affirmed.

No costs taxed.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
LEONARD GREEN
Clerk

Issued as Mandate: November 15, 1989

Costs: None

No. 88-1650
No. 88-1680
No. 88-1774
No. 88-1858

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MICHIGAN CONSOLIDATED GAS COMPANY, *et al.*,
Plaintiffs-Appellants,
(88-1650, 88-1680 &
88-1858),

v.

PANHANDLE EASTERN PIPE LINE COMPANY, *et al.*,
Defendants-Appellees.

NATIONAL STEEL CORPORATION and
PANHANDLE EASTERN PIPE LINE COMPANY,
Plaintiffs-Appellees,
(88-1774),

v.

WILLIAM E. LONG and EDWYNA G. ANDERSON,
Defendants-Appellants.

ORDER

Before: MERRITT and MILBURN; Circuit Judges; and LIVELY, Senior Circuit Judge.

Appellants Michigan Consolidated Gas Co. ("Mich-Con"), the Michigan Gas Utilities Co. ("MGU"), the State of Michigan, the Michigan Public Service Commis-

sion ("MPSC"), and Commission members William E. Long and Edwyna G. Anderson appeal the summary judgments granted against them on the ground that Michigan's authority to regulate the interstate transportation of natural gas is preempted by federal law.

These consolidated appeals arise from a "bypass" transaction in which National Steel Corporation ("National") has agreed to purchase gas in Oklahoma and have it transported directly to its Great Lakes Steel Division through Panhandle Eastern Pipe Line Company's ("Panhandle") pipelines. This direct delivery, connected July 1988, enables National to bypass the local gas distributing company, MichCon.

On December 12, 1985, Panhandle applied for a Certificate of Public Convenience and Necessity from the Federal Energy Regulatory Commission ("FERC") authorizing the bypass transportation and construction of the facilities necessary to connect the bypass. On January 27, 1987, after full hearings on the matter, a FERC Administrative Law Judge issued an initial decision recommending approval of Panhandle's application. MichCon and the MPSC filed exceptions to that recommendation with the FERC. On September 10, 1987, the FERC issued the certificate authorizing the bypass and all necessary construction. MichCon, the MPSC, and the State of Michigan filed for a rehearing. FERC held that Panhandle's "bypass" involved only interstate transportation and no "local distribution" of gas. MichCon and the MPSC have appealed these FERC orders to the United States Court of Appeals for the District of Columbia Circuit, No. 88-1062, and consolidated cases.

The parties to this appeal have raised the following issues: (1) whether the direct delivery of gas to an industrial consumer, bypassing the established utility, constitutes "local distribution" of gas within the meaning of the Natural Gas Act (15 U.S.C. section 717 *et seq.*); (2) whether the MPSC can exercise concurrent jurisdic-

tion over the bypass delivery of gas; and (3) whether the MPSC's exercise of jurisdiction over the bypass constitutes an impermissible burden on interstate commerce.

However, at the conclusion of oral argument and before these consolidated cases were taken under submission, the panel directed the parties to file supplemental briefs within thirty days on the relationship between these consolidated appeals and the appeals in the District of Columbia Circuit involving the same parties. The supplemental briefs have now been filed.

It appearing to the court after further consideration of this matter that while residual issues may exist following a decision by the United States Court of Appeals for the District of Columbia Circuit in *Michigan Consolidated Gas Co. v. FERC*, No. 88-1062, and consolidated cases, a controlling issue in these cases may be decided by the District of Columbia Circuit; *viz.*, whether or not Panhandle's "bypass" involves only interstate transportation and no "local distribution" of gas.

Accordingly, it is ORDERED that the appeals herein be and they hereby are stayed pending the decision of the United States Court of Appeals for the District of Columbia Circuit in *Michigan Consolidated Gas Co. v. FERC*, No. 88-1062, and consolidated cases.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Clerk

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

File No. L87-30 CA5

HON. ROBERT HOLMES BELL

NATIONAL STEEL CORPORATION and
PANHANDLE EASTERN PIPE LINE COMPANY,
Plaintiffs,

-vs-

WILLIAM E. LONG and
EDWYNA G. ANDERSON,
Defendants.

File No. L87-46 CA5

HON. ROBERT HOLMES BELL

MICHIGAN CONSOLIDATED GAS COMPANY,
a Michigan Corporation,
Plaintiff,

and

STATE OF MICHIGAN,
MICHIGAN PUBLIC SERVICE COMMISSION, and
MICHIGAN GAS UTILITIES COMPANY,
Intervening Plaintiffs,

-vs-

PANHANDLE EASTERN PIPE LINE COMPANY,
a Delaware Corporation,
Defendant,

and

NATIONAL STEEL CORPORATION,
Intervening Defendant.

OPINION OF THE COURT

These two consolidated actions present issues regarding the interplay of the regulatory authority of the Federal Energy Regulatory Commission and the Michigan Public Service Commission over the interstate transportation and delivery of natural gas. Now before the Court are cross-motions for summary judgment, supported by extensive stipulation of fact. In essence, the motions require the Court to determine whether in this case, the asserted regulatory authority of the Michigan Public Service Commission is precluded by federal law.

FACTUAL BACKGROUND

The proposed activity which gives rise to this dispute is rather straightforward. National Steel Corporation (National Steel) has arranged for the purchase of natural gas from Union Texas Products Corporation in Oklahoma at facilities that are connected with the interstate transportation system of Panhandle Eastern Pipe Line Company (Panhandle). Panhandle has agreed to transport the gas exclusively through its own lines directly to National Steel's Great Lakes Steel Division in Ecorse and River Rouge, Michigan. This direct delivery will enable National Steel to "bypass" the local distributing company, Michigan Consolidated Gas Company (Michigan Consolidated), which currently transports gas to the Great Lakes plant, purporting to substantial cost-savings.

In order to perform this bypass transportation service, Panhandle applied to the Federal Energy Regulatory Commission (Commission) under § 7(c) of the Natural Gas Act. 15 U.S.C. § 717f(c), for a certificate of public convenience and necessity, authorizing the proposed transportation and requisite extension of facilities. The certificate was granted on September 10, 1987. This certificate notwithstanding, the Michigan Public Service

Commission (MPSC) asserts under Act 69 of Michigan Public Acts of 1929, M.C.L. § 460.501 *et seq.*; M.S.A. § 22.141 *et seq.*, that the proposed transportation may not proceed until after it has issued its own certificate of public convenience and necessity.[1] Accordingly, the MPSC sought and obtained from this Court a preliminary injunction restraining such transportation pending the Court's final determination whether the MPSC does in fact have jurisdiction to regulate the delivery of natural gas to National Steel. It is to this question which the Court now turns.

NATURAL GAS ACT

The proposed transportation of natural gas is transportation in interstate commerce. "Gas crossing a state line at any stage of its movement to the ultimate consumer is in interstate commerce during the entire journey." *Maryland v. Louisiana*, 451 U.S. 725, 755, 101 S.Ct. 2114, 68 L.Ed.2d 576 (1981). The authority of the individual states to regulate such transportation is fundamentally restricted by the Commerce Clause, U.S. Const. Art. 1, § 8, which empowers Congress to regulate commerce among the several states. In 1938, Congress delegated its authority to regulate interstate transportation of natural gas to the Federal Power Commission by

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[1] Section 2 of 1929 P.A. 69 provides:

> No public utility shall hereafter begin the construction or operation of any public utility plant or system thereof nor shall it render any service for the purpose of transacting or carrying on a local business either directly, or indirectly, by serving any other utility or agency so engaged in such local business, in any municipality in this state where any other utility or agency is then engaged in such local business and rendering the same sort of service, or where such municipality is receiving service of the same sort, until such public utility shall first obtain from the commission a certificate that public convenience and necessity requires or will require such construction, operation, service, or extension.

M.C.L. § 460.502, M.S.A. § 22.142.

enacting the Natural Gas Act ("Act"), 15 U.S.C. § 717 *et seq.* The Act provides at § 1(b):

> The provisions of this chapter shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas.

15 U.S.C. § 717(b). The Act thus conferred upon the Federal Power Commission, predecessor of the Federal Energy Regulatory Commission, power to regulate three things, which the states had been deemed, by virtue of the Commerce Clause, unable to regulate: (1) transportation of natural gas in interstate commerce; (2) sale of natural gas in interstate commerce for resale; and (3) natural gas companies engaged in such transportation or sale. *Panhandle Eastern Pipe Line Co. v. Public Service Commission of Indiana,* (*Panhandle/Indiana*) 332 U.S. 507, 516, 68 S.Ct. 190, 92 L.Ed. 128 (1947).

The Act was designed not to encroach upon the states' regulatory authority, but to complement it, establishing a means whereby those aspects of natural gas commerce which had traditionally been deemed beyond the reach of state control, could be federally regulated. *Id.*, 332 U.S. at 517. The Act thus created a "comprehensive and effective regulatory scheme" • • • • "of co-operative action between federal and state agencies." *Id.*, 332 U.S. at 520. The pre-existing regulatory power of the states was left intact, undiluted by the Act. Id., 332 U.S. at 518.

Prior to the Act, the parameter of state authority had been determined through case-by-case interest balancing

analysis under the Commerce Clause. *Federal Power Commission v. Southern California Edison Co.*, 376 U.S. 205, 213-216, 84 S.Ct. 644, 11 L.Ed.2d 638 (1964). In the Act, Congress obviated the need for such case-by-case analysis, drawing "a bright line easily ascertained, between state and federal jurisdiction." *Id.*, 376 U.S. at 215-216. While confirming that interstate *transportation* of natural gas is federally regulable, the Act draws a "clear and complete" line between sales for resale, which are subject to federal jurisdiction, and direct sales for consumptive uses, subject to state jurisdiction. *Id.*, 376 U.S. at 214-215. In addition, the Act expressly recognizes that "local distribution" and the facilities used therefor are exempt from federal jurisdiction.

Thus, application of the Act's bright line test to determine the bounds of federal and state jurisdiction in this case requires consideration of three elements: (1) the scope of the Commission's jurisdiction over interstate transportation (2) whether the proposed transaction includes a direct retail sale; and (3) whether the proposed transaction includes local distribution.

APPLICATION OF THE BRIGHT LINE

(1) *Interstate Transportation.* Panhandle's proposed transportation of natural gas from Oklahoma to Michigan is interstate transportation subject to regulation by the Commission. The Commission's jurisdiction over transportation applies regardless of whether the gas transported is ultimately sold retail or wholesale. *Federal Power Commission v. Louisiana Power & Light Co.*, 406 U.S. 621, 636, 92 S.Ct. 1827, 32 L.Ed2d 369 (1972). Moreover, the Commission's transportation jurisdiction extends to the point of delivery and covers the facilities through which the gas is delivered. *Panhandle/Indiana, supra; Federal Power Commission v. East Ohio Gas Co.*, 338 U.S. 464, 70 S.Ct. 266, 94 L.Ed. 268 (1950); *International Paper Co. v. Federal Power Commission*, 438

F.2d 1349 (2d Cir. 1971); *United Gas Pipe Line Co. v. Federal Power Commission*, 385 U.S. 83, 87 S.Ct. 265, 17 L.Ed.2d 181 (1986). Hence, that the Commission had authority to pass on and grant Panhandle's application for a certificate of public convenience and necessity is not seriously contested. It remains to be determined whether the MPSC *also* has jurisdiction over some aspect of the proposed transaction.

(2) *Direct Retail Sale.* Notwithstanding the Commission's transportation jurisdiction, the Act reserves for the states authority to regulate the actual sales of natural gas directly to consumers. Here, the proposed transaction clearly involves direct retail sale of natural gas to National Steel for its own consumption. It is just as clear, however, that the sale takes place not in Michigan, but in Oklahoma. There is no transfer of title in Michigan, but simply the delivery by Panhandle of natural gas which already belongs to National Steel. The MPSC's authority to regulate retail sales would thus appear to provide no basis for its present assertion of jurisdiction.

The Court is urged, however, to look beyond the form of the proposed transaction. In its effect upon local interests, it is argued, the proposed transaction is identical to those which have been held subject to state regulation in *Panhandle/Indiana*, *supra*, and *Panhandle Eastern Pipe Line Co. v. Michigan Public Service Commission*, 341 U.S. 329, 71 S.Ct. 777, 95 L.Ed 993 (1951) (*Panhandle/Michigan*). For this reason, the Court is asked to deem the transaction a "de facto sale" in Michigan, which is subject to regulation by the MPSC.

In *Panhandle/Indiana* and *Panhandle/Michigan*, Panhandle sought to transport *and sell* natural gas in interstate commerce directly to industrial end-users. At issue in each case was whether the state in which the gas was received and purchased retained regulator authority over

the transaction even though such regulation would invariably touch upon interstate commerce. In ruling that the states did have power to regulate, the Supreme Court looked to the language of § 1(b) of the Natural Gas Act. Since the subject sales of natural gas were not for resale, but were in the nature of an "other sale" not subject to federal regulation and traditionally regulable by the states; and since the Act was construed as not having usurped or diminished preexisting state regulatory power, the states were deemed to have continuing authority to regulate the *sales*. Thus, the ruling in each case was tied closely to the language of the Act and the "bright line" established by Congress: sales for resale are subject to federal regulation; sales for consumptive use are subject to state regulation.[2] The *Panhandle/Indiana* and *Panhandle/Michigan* decisions do not offer persuasive support for the contention that sufficiently important local interests may justify treatment of a non-sale transaction as a sale so that it fits on one side of the bright line or the other.

In *United Gas Improvement Co. v. Continental Oil Co.*, 381 U.S. 392, 85 S.Ct. 1517, 14 L.Ed.2d 466 (1965), lease-sale transactions were deemed to be "sales" of natural gas for purposes of the Act. The Court determined that paying slavish respect to the form of the transactions, while ignoring their economic realities, would permit avoidance of Federal Power Commission jurisdiction and circumvention of the Act's purposes. The court held the Act "would be hamstrung if it were tied down to technical concepts of local law." *Id.*, 381 U.S. at 400. None of these three concerns is present here. National

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[2] It is true that in both cases, the court buttressed its application of the Act's bright line by discussing the importance of the local interests as justification for finding state authority even if Congress had not so clearly spoken. However, the importance of local interests was not the gravamen of the court's reasoning; the Act's language was.

Steel and Panhandle do not seek to avoid the Commission's jurisdiction, but have submitted thereto and have obtained the requisite certification. Secondly, as is more fully discussed *infra*, the Court does not believe the purposes of the Act are circumvented through this proposed transaction, for the very reason that it is subject to the Commission's regulation. Finally, this case does not present the potential of emasculating the Act through adherence to technical concepts of local law. At issue here, rather, is a contractual bailment arrangement. Cf. *Pennzoil Co. v. Federal Energy Regulatory Commission*, 645 F.2d 360, 386, n.55 (5th Cir. 1981).

Moreover, the "de facto sale" theory was rejected in *Public Service Electric & Gas Co. v. Federal Power Commission*, 371 F.2d 1 (3d Cir. 1967), *cert. denied* 389 U.S. 849, 88 S.Ct. 33, 19 L.Ed.2d 119 (1967), under facts very similar to those here presented. Where a natural gas producer hired the services of an interstate pipeline company to transport the producer's gas across state lines for consumption at another facility of the producer, the fact that the gas was commingled with gas belonging to the pipeline company was held not to compel the conclusion that a succession of sales had taken place where there was no evidence from which to infer that the parties intended anything other than the bailment of a fungible commodity. *Id.*, 371 F.2d at 4. The Court finds this reasoning persuasive and directly applicable in this case.

Accordingly, the Court declines to construe the proposed transaction as including a direct retail sale by Panhandle to National Steel which is subject to MPSC jurisdiction.

(3) *Local Distribution.* It is further contended the Commission's transportation jurisdiction does not limit the MPSC's authority, expressly preserved by § 1(b) of the Act, to regulate local distribution of natural gas and the facilities used therefor. The question posed, then, is

whether any aspect of the proposed transaction constitutes "local distribution." Although the Act does not define "local distribution," valuable insight into congressional intent is found in H.R. Rep. 709, at p.3, 75th Cong., 1st Sess. (1937):

> In view of the importance of section 1(b), which states the scope of the act, it seems advisable to comment on certain provisions appearing therein. It will be noted that this subsection of the bill, after affirmatively stating, the matters to which the act is to apply, contains a provision specifying what the act is not to apply to, as follows:
>
> > "but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas."
>
> The quoted words are not actually necessary, as the matters specified therein could not be said fairly to be covered by the language affirmatively stating the jurisdiction of the Commission, but similar language was in previous bills, and, rather than invite the contention, however unfounded, that the elimination of the negative language would broaden the scope of the act the committee has included it in this bill. *That part of the negative declaration stating that the act shall not apply to "the local distribution of natural gas" is surplusage by reason of the fact that distribution is made only to consumers in connection with sales, and since no jurisdiction is given to the Commission to regulate sales to consumers the Commission would have no authority over distribution, whether or not local in character.* (Emphasis added.)

House Report No. 709, thus, strongly suggests Congress understood and intended the "local distribution" exemp-

tion to be coextensive with the "other sale" exemption. That is, neither exemption was deemed to diminish the Commission's authority, because the Commission had, in the first instance, been affirmatively granted jurisdiction only over interstate transportation and sales for resale. In other words, Congress understood "local distribution" as necessarily entailing direct retail sales for consumptive use. According to this construction, unless a transaction includes a direct retail sale, it does not constitute local distribution. Since, as discussed *supra*, Panhandle's proposed transportation of natural gas to National Steel is, to the point of delivery, interstate transportation,[3] and does not include a direct retail sale in Michigan, it is not exempt from the Commission's jurisdiction under the Act's "local distribution" proviso.

The reliability of House Report No. 709 and the soundness of the above conclusion are substantiated by the ruling in *Federal Power Commission v. Louisiana Power & Light Co.*, 406 U.S. 621, 92 S.Ct. 1827, 32 L.Ed.2d 369 (1972). In *Louisiana Power & Light*, the court addressed the "other sale" proviso of § 1(b). Based upon House Report No. 709, the court held the proviso "was meant to apply exclusively to *rate-setting*, and in no wise limited the broad base of 'transportation' jurisdiction granted the FPC." *Id.*, 406 U.S. at 640.

House Report No. 709 is a no less reliable indicator of congressional intent regarding the scope of the "local distribution" proviso. The proviso was viewed as mere "surplusage." Rather than diminishing the Commission's

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[3] The Court attaches, for purposes of identifying the transportation as "interstate" or "intrastate," no significance to the point at which the subject natural gas is transferred from high pressure transmission lines to low pressure lines. This distinction, drawn in *Federal Power Commission v. East Ohio Gas Co., supra*, is of questionable validity, cf. *Panhandle/Indiana, supra*, 322 U.S. at 513, and offers no instruction as to the meaning of "local distribution" in this case.

jurisdiction over interstate transportation and sales for resale in any substantive manner, it merely makes clear that "sales for resale" does not include direct retail sales for consumptive use "whether or not local in character." Thus, applying the § 1(b) "local distribution" proviso in conformance with congressional intent, the Court concludes it provides no basis for MPSC regulation of the proposed transaction.

The Court admits the contention that "local distribution" should be given a broader meaning out of respect for the states' authority to regulate matters of essentially local concern has facial appeal. Indeed, the instant proposed service *may* represent only the first of several similar arrangements for direct delivery of natural gas by Panhandle to other industrial end users in southeastern Michigan. If Panhandle were permitted to expand its direct service in this way, its operation could have a profound impact upon local gas supplies and rate structures.

In *Associated Gas Distributors v. Federal Energy Regulatory Commission*, 824 F.2d 981, 1035-37 (D.C. Cir. 1987) the court speculated in dictum that state agencies may have authority to regulate bypass transportation. The speculation is based upon the *Panhandle/Michigan* ruling that states retain authority under the Act to regulate direct *sales* to an industrial end user even though such sales are in interstate commerce. Yet, as indicated *supra*, careful reading of *Panhandle/Michigan* reveals it is based not upon a balancing of state and federal interests, but upon reference to the language of the Act. That is precisely the point. The courts are no longer free to engage in interest balancing to determine the relative parameters of federal and state jurisdiction. In fact, the § 1(b) bright line, "clear and complete," "easily ascertained," was specifically designed to obviate the need for such analysis. *Federal Power Commission v. Southern California Edison Co., supra.* The Court's task, then,

consistent with *Panhandle/Michigan*, is to apply the language employed in § 1(b) so as to effectuate congressional intent. This the Court has done.

The Court notes that if Panhandle were permitted to expand its direct service to other industrial end users in southeastern Michigan through various short extensions of interconnect facilities branching off from its interstate pipeline, its operation would begin to resemble the process of "distributing gas among consumers within a particular local community." *Federal Power Commission v. East Ohio Gas Co., supra*, 338 U.S. at 469-70. However, this *potential* sort of "local distribution" is not yet before the Court and, in any event, was clearly not within the contemplation of Congress in 1938 when § 1(b) was enacted. The Court must effectuate the intent of Congress which actually informed the language used in 1938, not the intent which the Court believes Congress might have had were it presented the facts and circumstances now before the Court. Moreover, the Court must construe § 1(b) exceptions to federal jurisdiction strictly. *Interstate Natural Gas Co. v. Federal Power Commission*, 331 U.S. 682, 691, 67 S.Ct. 1482, 91 L.Ed. 1742 (1946). Again, in concluding that no part of the proposed transaction constitutes local distribution, the Court believes it has been faithful to its task.

In summary, application of the § 1(b) bright line test of jurisdiction indicates the Act expressly confers upon the Commission authority to regulate the proposed interstate transportation of natural gas. The Act, on its face, provides no affirmative basis for regulation by the MPSC under either the "other sale" or "local distribution" provisos. The question remains whether the MPSC may exercise some residual authority not specifically mentioned in the Act or, on the other hand, whether such authority is preempted by the Commission's transportation jurisdiction under the Act.

PREEMPTION

It is contended that, prior to the Act, the states were recognized as having authority to regulate the sort of transportation and delivery of gas proposed here. Since the Act did not diminish the states' pre-existing authority, the MPSC is said to be entitled to exercise such authority under 1929 P.A. 69, even though the subject transportation does not involve a direct retail sale or local distribution.

It is unquestionably true that the states retain the regulatory authority they possessed before the Act came into being:

> The Act, though extending federal regulation, had no purpose or effect to cut down state power. On the contrary, perhaps its primary purpose was to aid in making state regulation effective, by adding the weight of federal regulation to supplement and reinforce it in the gap created by prior decisions.[13]

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[13] In H. Rep. No. 709, 75th Cong., 1st Sess., the Committee on Interstate and Foreign Commerce said of the proposed bill which became the Natural Gas Act: "It confers jurisdiction upon the Federal Power Commission over the transportation of natural gas in interstate commerce, and the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use. The States have, of course, for many years regulated sales of natural gas to consumers in intrastate transactions. The States have also been able to regulate sales to consumers even though such sales are in interstate commerce, such sales being considered local in character and in the absence of congressional prohibition subject to State regulation. (See Pennsylvania Gas Co. v. Public Service Commission (1920), 252 U.S. 23 [40 S. Ct. 279, 64 L.Ed. 434].) There is no intention in enacting the present legislation to disturb the States in their exercise of such jurisdiction. However, in the case of sales for resale, or so-called wholesale sales, in interstate commerce (for example, sales by producing companies to distributing companies) the legal situation is different. Such transactions have been considered to be not local in character

> The Act was drawn with meticulous regard for the continued exercise of state power, not to handicap or dilute it in any way.

Panhandle/Indiana, supra, 332 U.S. at 517-18. In this excerpt, the Supreme Court acknowledges that the states had the power, prior to the Act, (i.e., where Congress had not acted contrarily in exercise of its power under the Commerce), to regulate *sales* to consumers. This is the pre-existing state authority which the Act preserved by codifying the bright line, while conjunctively investing the Commission with power to regulate interstate transportation. There is no clear support for the proposition that the state ever had power to regulate direct delivery of gas in interstate commerce—in the absence of a sale. The courts simply were never faced with the sort of transportation arrangement proposed here. To opine that state regulation of Panhandle's proposed transportation would have been deemed an acceptable burden upon interstate commerce would be pure speculation. Such speculation is no longer necessary or appropriate, for Congress in the Act has enumerated not all parameters of state authority, but those forms of state regulation which are acceptable encumbrances upon interstate commerce: regulation of "other sales," "local distribution," and "production or gathering." The unavoidable implication is that other forms of state regulatory interference with interstate transportation are prohibited, for Congress has "occupied the field" by delegating its authority over interstate commerce to the Commission.

> and, even in the absence of Congressional action, not subject to State regulation. (See [State of] Missouri v. Kansas [Natural] Gas Co. (1924, 265 U.S. 298 [44 S.Ct. 544, 68 L.Ed. 1027], and Public Service Commission [of Rhode Island] v. Attleboro Steam and Electric Co. (1927) 273 U.S. 83 [47 S.Ct. 294, 71 L.Ed. 549].) The basic purpose of the present legislation is to occupy this field in which the Supreme Court has held that the States may not act."

This analysis forms the backdrop for determining whether the Act and the Commission's exercise of regulatory jurisdiction thereunder pre-empts the MPSC's asserted authority. The pre-emption doctrine finds its roots in the Supremacy Clause, U.S. Const., Art. VI, cl. 2. Federal law is supreme and state law, to the extent it conflicts with federal law, is without effect. Application of the doctrine is a function of congressional intent. In *Louisiana Public Service Commission v. Federal Communications Commission*, 476 U.S. 355, ——, 106 S.Ct. 1890, 90 L.Ed.2d 369, 381-82 (1986) the court summarized the circumstances under which Congress is deemed to have intended pre-emption as follows:

> Pre-emption occurs when Congress, in enacting a federal statute, expresses a clear intent to pre-empt state law, Jones v. Rath Packing Co. 430 U.S. 519, 51 L.Ed.2d 604, 97 S.Ct. 1305 (1977), when there is outright or actual conflict between federal and state law, e.g., Free v. Bland, 369 U.S. 663, 8 L.Ed.2d 180, 82 S. Ct. 1089 (1962), where compliance with both federal and state law is in effect physically impossible, Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 10 L.Ed.2d 1082, 83 S. Ct. 1210 (1963), where there is implicit in federal law a barrier to state regulation, Shaw v. Delta Air Lines, Inc. 463 U.S. 85, 77 L.Ed.2d 490, 103 S. Ct. 2890 (1983), where Congress has legislated comprehensively, thus occupying an entire field of regulation and leaving no room for the States to supplement federal law, Rice v. Santa Fe Elevator Corp. 331 U.S. 218, 91 L.Ed. 1447, 67 S. Ct. 1146 (1947), or where the state law stands as an obstacle to the accomplishment and execution of the full objectives of Congress. Hines v. Davidowitz, 312 U.S. 52, 85 L.Ed. 581, 61 S. Ct. 399 (1941). Pre-emption may result not only from action taken by Congress itself; a federal agency acting within the scope of its congressionally

> delegated authority may preempt state regulation. Fidelity Federal Savings & Loan Assn. v. De La Cuesta, 458 U.S. 141, 73 L.Ed.2d 664, 102 S. Ct. 3014 (1982); Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691, 81 L.Ed.2d 580, 104 S. Ct. 2694 (1984).

Several of the above examples are significant for present purposes.

First, there is a strong possibility of outright or actual conflict between federal and state law. Dual requirements of public convenience and necessity certification are not necessarily in conflict, but pose a great likelihood of conflict, since the MPSC would evaluate the same effects of the same proposed transportation from a somewhat different perspective than the Commission. The Supreme Court's recent ruling in *Schneidewind v. ANR Pipeline Co.*, 485 U.S. ——, 108 S.Ct. ——, 99 L.Ed.2d 316, 331-32 (1988) is instructive in this regard:

> When a state regulation "affect[s] the ability of [FERC] to regulate comprehensively . . . the transportation and sale of natural gas, and to achieve the uniformity of regulation which was an objective of the Natural Gas Act" or prevents the "prospect of interference with the federal regulatory power," then the state law may be pre-empted even though "collision between the state and federal regulation may not be an inevitable consequence." Northern Natural Gas Co., 372 U.S. at 91-92, 9 L.Ed.2d 601, 83 S. Ct. 646.

The *Schneidewind* court went on to hold that although "hypothetical conflicts" will not always demonstrate intent to preempt, "imminent possibility" of conflict evidences complete occupation of a field, which justifies preemption. *Id.* Exercise of the MPSC's asserted authority to regulate aspects of interstate transportation over which the Commission has plenary authority and over

which the Commission has in fact exercised jurisdiction would certainly create imminent possibility of conflict.

This imminent possibility of conflict is not the only evidence of congressional intent to occupy the field. The very purpose of the Act was to provide for federal regulation of interstate transportation of natural gas, something the states had been unable to regulate. In this respect, Congress, which "has undoubted power to define the distribution of power over interstate commerce," occupied the field. *Panhandle/Indiana, supra*, 332 U.S. at 519, 521. Congress was "meticulous" in specifying those aspects of interstate commerce as to which state regulation would be permissible. However, the regulatory power here asserted by the MPSC does not pertain to any of those aspects; it is pure and simple a direct and impermissible burden on interstate transportation.

Furthermore, the asserted exercise of jurisdiction by the MPSC, if permitted, would certainly "stand as an obstacle to the accomplishment and execution of the full objectives of Congress." In the Act, Congress sought to establish a scheme of comprehensive, complementary and cooperative action between federal and state agencies. *Panhandle/Indiana, supra*, 332 U.S. at 520. To make exercise of the transportation authorized granted Panhandle by the Commission contingent upon MPSC certification would be to severely undermine the Commission in discharging its duty to regulate interstate transportation comprehensively and uniformly. To permit the MPSC to make its own determination of public convenience and necessity, potentially revoking the Commission's determination thereof would be to stultify the complementary, cooperative roles envisioned by Congress. This result must be avoided. Cf. *Northern Natural Gas Co. v. State Corporation Commission of Kansas*, 372 U.S. 84, 83 S.Ct. 646, 9 L.Ed.2d 601 (1963); *First Iowa Hydro-Electric Cooperative v. Federal Power Commis-*

sion, 328 U.S. 152, 66 S.Ct. 906, 90 L.Ed 1143 (1946); *Public Service Commission of West Virginia v. Federal Power Commission*, 437 F.2d 1234, 1238-39 (4th Cir. 1971).

For the same reasons, the Court rejects the notion of concurrent jurisdiction. Even those cases cited in support of concurrent jurisdiction recognize it is inappropriate where state regulation would materially affect interstate commerce in an area; (1) where uniformity of regulation is necessary, *Huron Portland Cement Co. v. Detroit*, 362 U.S. 440, 444, 80 S.Ct. 813, 4 L.Ed.2d 852 (1960), and (2) where state regulation would impair federal superintendence of the field, *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142, 83 S.Ct. 1210, 10 L.Ed.2d 248 (1963).

Accordingly, the Court concludes enforcement of 1929 P.A. 69, M.C.L. § 460.501 *et seq.*, M.S.A. § 22.141 *et seq.* by the MPSC with respect to Panhandle's proposed bypass transportation is pre-empted by the Act The preliminary injunction issued by this Court must be set aside and Panhandle must be permitted to exercise the transportation authority granted it by the Commission.

CONCLUSION

The Court is not oblivious to the substantial local interests at stake. In holding the MPSC may not exercise the asserted regulatory authority to protect those interests, the Court has merely given effect to the regulatory scheme established by Congress in accordance with its intent. Pursuant to this scheme, it is for the Commission to evaluate and protect local interests, through its public convenience and necessity certification procedures, as it regulates interstate transportation on a comprehensive, nationwide basis. If these procedures are deemed to offer inadequate protection, then it is for Congress to fashion an appropriate remedy.

An order consistent with this opinion shall issue forthwith.

Dated: June 16, 1988

/s/ Robert Holmes Bell
ROBERT HOLMES BELL
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

File No. L87-30-CA5

HON. ROBERT HOLMES BELL

NATIONAL STEEL CORPORATION and
PANHANDLE EASTERN PIPE LINE COMPANY,
Plaintiffs,

-vs-

WILLIAM E. LONG and EDWYNA G. ANDERSON,
Defendants.

File No. L87-46 CA5

HON. ROBERT HOLMES BELL

MICHIGAN CONSOLIDATED GAS COMPANY,
a Michigan Corporation,
Plaintiff,

and

STATE OF MICHIGAN,
MICHIGAN PUBLIC SERVICE COMMISSION and
MICHIGAN GAS UTILITIES COMPANY,
Intervening Plaintiffs,

-vs-

PANHANDLE EASTERN PIPE LINE COMPANY,
a Delaware Corporation,
Defendant,

and

NATIONAL STEEL CORPORATION,
Intervening Defendant.

JUDGMENT ORDER

In accordance with the Court's written opinion issued on June 16, 1988,

IT IS HEREBY ORDERED that the motions for summary judgment of National Steel Corporation and Panhandle Eastern Pipe Line Company are GRANTED;

IT IS FURTHER ORDERED that the motions for summary judgment of the Michigan Public Service Commission, William E. Long, Edwyna G. Anderson, Michigan Consolidated Gas Company, and Michigan Gas Utilities Company are DENIED;

IT IS FURTHER ORDERED that National Steel Corporation and Panhandle Eastern Pipe Line Company are awarded JUDGMENT in their favor, the asserted regulatory authority of the Michigan Public Service Commission having been pre-empted by federal law.

IT IS FURTHER ORDERED that the preliminary injunction issued by This Court on November 2, 1987 is dissolved.

Dated: June 16, 1988

/s/ Robert Holmes Bell
ROBERT HOLMES BELL
United States District Judge

STATUTORY PROVISIONS

NATURAL GAS ACT

Section 1, 15 U.S.C. § 717. Regulation of natural gas companies

(a) Necessity of regulation in public interest. As disclosed in reports of the Federal Trade Commission made pursuant to S. Res. 83 (Seventieth Congress, first session) and other reports made pursuant to the authority of Congress, it is hereby declared that the business of transporting and selling natural gas for ultimate distribution to the public is affected with a public interest, and that Federal regulation in matters relating to the transportation of natural gas and the sale thereof in interstate and foreign commerce is necessary in the public interest.

(b) Transactions to which provisions of 15 USCS §§ 717 et seq. applicable. The provisions of this Act shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas.

(c) Intra-state transactions exempt from provisions of 15 USCS §§ 717 et seq.; certification from state commission as conclusive exidence. The provisions of this Act shall not apply to any person engaged in or legally authorized to engage in the transportation in interstate commerce or the sale in interstate commerce for resale, of natural gas received by such person from another person within or at the boundary of a State if all the na-

tural gas so received is ultimately consumed within such State, or to any facilities used by such person for such transportation or sale, provided that the rates and service of such person and facilities be subject to regulation by a State commission. The matters exempted from the provisions of this Act by this subsection are hereby declared to be matters primarily of local concern and subject to regulation by the several States. A certification from such State commission to the Federal Power Commission that such State commission has regulatory jurisdiction over rates and service of such person and facilities and is exercising such jurisdiction shall constitute conclusive evidence of such regulatory power of jurisdiction.

Section 7(c), 15 U.S.C. § 717f(c)(1)(A)

No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations: Provided, however, That if any such natural-gas company or predecessor in interest was bona fide engaged in transportation or sale of natural gas, subject to the jurisdiction of the Commission, on the effective date of this amendatory Act, over the route or routes or within the area for which application is made and has so operated since that time, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission within ninety days after the effective date of this amendatory Act.

Pending the determination of any such application, the continuance of such operation shall be lawful.

MICHIGAN ACT 69

MCL460.501 Definitions.

SEC. 1. The term "municipality", when used in this act, means a city, village or township.
when required.

The term "public utility", when used in this act, means persons and corporations, other than municipal corporations, or their lessees, trustees and receivers now or hereafter owning or operating in this state equipment or facilities for producing, generating, transmitting, delivering or furnishing gas or electricity for the production of light, heat or power to or for the public for compensation.

The term "commission", when used in this act, means the Michigan public utilities commission or such other state governmental agency as may exercise the powers now conferred upon said commission. (MCL § 460.501; CL '29, § 11087.)

MCL460.502 Certificate of convenience and necessity, when required.

SEC. 2. No public utility shall hereafter begin the construction or operation of any public utility plant or system thereof nor shall it render any service for the purpose of transacting or carrying on a local business either directly, or indirectly, by serving any other utility or agency so engaged in such local business, in any municipality in this state where any other utility or agency is then engaged in such local busines and rendering the same sort of service, or where such municipality is receiving service of the same sort, until such public utility shall first obtain from the commission a certificate that public convenience and necessity requires or will require such construction, operation, service, or extension. (MCL § 460.502; CL '29, § 11088.)

No. 89-1160

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

STATE OF MICHIGAN,-MICHIGAN PUBLIC SERVICE COMMISSION, WILLIAM E. LONG and EDWYNA ANDERSON,
Petitioners,

v.

PANHANDLE EASTERN PIPE LINE COMPANY and NATIONAL STEEL CORPORATION,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

BRIEF OF RESPONDENT NATIONAL STEEL CORPORATION IN OPPOSITION

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QUESTION PRESENTED

Whether a Michigan statute, applied to regulate an interstate pipeline's FERC-approved transportation of natural gas in interstate commerce, and the facilities for the delivery thereof to the consumer-owner of the gas, is preempted by the Natural Gas Act, 15 U.S.C. §§ 717, *et seq.*

IDENTITY OF AFFILIATES

National Steel Corporation is a Delaware Corporation. It is jointly owned by two parent entities, NII Capital Corporation and NKK U.S.A. Corporation. These corporations are not publicly traded but are subsidiaries of the publicly traded corporations, National Intergroup, Inc. and NKK Corporation. National Steel Corporation has the following subsidiaries owned jointly with others, none of which is publicly traded:

Buffalo River Improvement Corporation
Concast Holding A.G.
Iron Ore Company of Canada
Iron Ore Land Company
Mathies Coal Company
The Messaba-Cliffs Mining Company
Pilot Knob Pellet Company
Presque Isle Corporation
ProCoil Corporation
Taylor Devices, Inc.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-1160

STATE OF MICHIGAN, MICHIGAN PUBLIC SERVICE COMMISSION, WILLIAM E. LONG and EDWYNA ANDERSON,
Petitioners,

v.

PANHANDLE EASTERN PIPE LINE COMPANY and NATIONAL STEEL CORPORATION,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

BRIEF OF RESPONDENT NATIONAL STEEL CORPORATION IN OPPOSITION

SUMMARY OF ARGUMENT

This case is not sufficiently important to warrant review by this Court. FERC decisions almost always have an impact on rates and rate designs of local utilities regulated by the state, and the fact that such is the case here does not warrant this Court's attention. Moreover, as this Court has recently stated in *Northwest Central Pipeline*, *infra*, one agency's exercise of authority granted under the NGA will not be thwarted merely because such exercise may have an effect on rates established by another agency. In addition, there is no conflict among the circuits involving any of the issues in this case.

The decision below is entirely consistent with the scheme of federal regulation under the NGA. The transaction in question, which is the transportation by Panhandle of National's own gas which it purchases in Oklahoma and delivers to Panhandle for redelivery at National's plant in Michigan, is clearly the "transportation of natural gas in interstate commerce" subject to exclusive FERC jurisdiction. Michigan's arguments that the transaction constitutes "local distribution" of gas, reserved by the NGA for state regulation, are unsupported by the legislative history of the NGA, by caselaw, or by reasoned analysis. The legislative history of the NGA, which has been cited in several decisions of this Court, clearly establishes that "local distribution" means *only* the retail sale of gas. Here, Panhandle is *not* making a sale. The pre-NGA cases cited by Michigan are not relevant to the issue of the scope of state authority under the NGA because Congress itself intended, by the precise language used in the NGA, to draw a "bright line" between federal/state jurisdiction. The language of the statute speaks for itself. Numerous decisions of this Court interpreting the NGA have established that Congress' grant to FERC of jurisdiction over the transportation of natural gas in interstate commerce is all-encompassing, and support the conclusion of the court below that:

> "It is hardly conceivable that a transaction could fit more neatly into the category of 'transportation of natural gas in interstate commerce'."

Michigan's heavy reliance on *Panhandle/Michigan, infra*, is in error. Indeed, any comparison of the situation here to that in *Panhandle/Michigan* is spurious. The *Panhandle/Michigan* case involved the retail *sale* of gas clearly subject to rate regulation by the state because it constituted "local distribution". *Panhandle/Michigan* was not a preemption case, it was a burden on commerce case involving whether the state could prohibit the retail sale of gas in interstate commerce by impos-

ing *certificate* jurisdiction. Here, there is no local sale taking place over which Michigan can impose certificate jurisdiction. Finally, this case is distinguishable from *Panhandle/Michigan* in that there, Panhandle was attempting to avoid all regulation, where as here the transaction has been subjected to close regulatory scrutiny by the FERC.

Having found that the transaction in question constituted the interstate transportation of gas subject to FERC jurisdiction, the Court below also correctly concluded that exercise of jurisdiction by Michigan over the same transaction was preempted under the authority of *Schneidewind v. ANR Pipeline, infra.* Michigan's argument that Congress did not intend preemption to occur in a case of this nature rests on its fundamentally erroneous assertion that the transaction in question constitutes "local distribution".

Finally, Michigan's reliance on this Court's recent decision in *Northwest Central Pipeline* is misplaced because in that case the state was found to be acting within an area expressly reserved to it under the NGA, whereas here Michigan is attempting to regulate the transportation of gas in interstate commerce; an area expressly and exclusively reserved to the FERC by Congress.

STATEMENT OF THE CASE

Respondent National Steel Corporation ("National") will not unnecessarily repeat the description of the proceedings below or the basic facts relating to this controversy which are contained in the Statement of the Case in the Petition of the Michigan Public Service Commission and the State of Michigan ("Michigan"). National will, however, expand upon and clarify some of the facts.

MichCon has not sold any gas to National since early 1986, when National commenced purchasing its gas di-

rectly from producers in states such as Oklahoma and Louisiana.[1] Since then, National has been contracting with interstate pipelines to transport its gas roughly 1,000 miles from the producing states into Michigan where, until recently, possession of the gas was turned over to the local utility, MichCon, for National's account. MichCon would then transport National's gas about 5 miles and redeliver the gas to National for a charge of about $.78 per thousand cubic feet, or approximately $10 million per year.

As the Federal Energy Regulatory Commission ("FERC") found in its hearings on Panhandle's application to provide direct service to National, "National Steel is in a struggle to survive and to do so it is reasonable for it to take every measure that it can to reduce its costs."[2] One such effort which National took was to request Panhandle to deliver gas owned by National directly from the producing state to its steel plant in Michigan. After vigorous pursuit by National, Panhandle finally sought and received from the FERC a certificate of public convenience under § 7(c) of the National Gas Act ("NGA"), 15 U.S.C. § 717b(c), to transport National's gas directly to it, and to construct the facilities necessary to effect delivery of the gas. Under the transaction certificated by the FERC,[3] Panhandle will receive National's gas in Oklahoma, transport it approximately 1,000 miles through several states into Michigan, and redeliver National's gas to its steel mill near Detroit for

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[1] National's ability to purchase gas directly from producers in other states free from regulation by Michigan is not an issue in controversy.

[2] *Panhandle Eastern Pipe Line Co.*, 38 FERC (CCH) ¶ 63,009 (1987) at pg. 65,043, affirmed 40 FERC (CCH) ¶ 61,220 (1987), *aff'd*, 883 F.2d 117 (D.C. Cir. 1989).

[3] The FERC's regulation of the transaction includes the services of reeeipt, transportation and redelivery, as well as the facilities to provide such service.

a charge of about $.41 per thousand cubic feet. A portion of Panhandle's pipeline happens to run directly across National's steel plant property. Consequently, National will be able to receive the gas from Panhandle within its existing plant boundary, without the necessity of constructing additional pipeline facilities through the streets and alleys of the Detroit area. Another critical fact which cannot be emphasized too strongly is that *National will not purchase any gas from Panhandle.* National will purchase gas from a producer in Oklahoma prior to delivery of that gas to Panhandle for redelivery following interstate transportation directly to National's plant in Michigan.

In its Statement of the Case, Michigan refers to the Opinion of the D.C. Circuit in the case involving the appeal of the FERC's Order which granted the certificate of public convenience and necessity for direct delivery of gas by Panhandle to National.[4] Michigan notes that the D.C. Circuit held that FERC had jurisdiction to issue such an Order because the Panhandle/National transaction involves "transportation of natural gas in interstate commerce"; an activity expressly subject to federal regulation under the NGA. Michigan then complains that the Sixth Circuit merely incorporated the D.C. Circuit's holding and proceeded to find that the Michigan statute was preempted "without any analysis" of Michigan's argument that the NGA reserved to Michigan authority over the "local distribution" of gas within the meaning of the NGA, thus precluding a finding that there was a conflict between federal and state authority. This assertion is absolutely incorrect, as is apparent from the face of the Sixth Circuit's Opinion which correctly framed the issue and adopted the analyses of the issue by both the D.C. Circuit and the District Court below. (Appen-

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[4] *Michigan Consolidated Gas Co. v. Federal Energy Regulatory Comm.*, 883 F.2d 117 (D.C. Cir. 1989), *petition for cert. pending sub nom. State of Michigan v. FERC*, No. 89-1161.

dix, 8a-9a). This point will be discussed in greater detail at page 16 of this brief.

Also, Michigan's Statement of the Case contains extensive argument regarding the applicability of *Panhandle Eastern Pipe Line Co. v. Michigan Public Service Comm.*, 341 U.S. 329, 95 L. Ed. 993, 71 S. Ct. 777 (1951), ("Panhandle/Michigan") to this case. That subject will be dealt with as a separate issue at page 18 of this brief.

REASONS FOR DENYING THE WRIT

I. THE QUESTION OF LAW PRESENTED IN THIS CASE IS NOT SUFFICIENTLY IMPORTANT TO WARRANT REVIEW BY THIS COURT.

Michigan argues that this case presents an important question of federal law which should be settled by this Court. The federal law question is whether Panhandle's direct delivery to National of National's own gas, which it purchases in another state and has transported on Panhandle's pipeline in interstate commerce to the point of redelivery, constitutes "local distribution" under § 1 (b) of the Natural Gas Act ("NGA"), 15 U.S.C. § 717 (b). It is an important question, Michigan maintains, because ". . . rates and rate designs adopted by state utility commissions for the general ratepaying public will be profoundly affected if FERC is allowed to authorize interstate pipelines to serve large industrial consumers . . . ." Petition, page 7. The fallacy of this argument is its assumption that if the federal legal question arises in the context of a FERC decision affecting rates and rate designs adopted by a state regulatory authority, then the decision relating to such question is necessarily worthy of this Court's review. Were that the situation, this Court could dedicate a major portion of its docket just to cases involving decisions of the FERC; for rarely does a FERC decision *not* have a significant, frequently profound, effect on rates and rate designs of local utilities

which purchase gas and receive transportation services from interstate pipelines.

Also, the merits of Michigan's argument, if successful, would establish a rule of reverse preemption; if a FERC decision would have an effect on rates and rate designs which are the subject of state regulation, the FERC is powerless to act. There is, however, no basis for the proposition that, absent express Congressional intent, *federal* interests must fall when they conflict with *state* interests. In addition, the notion that preemption will result when one agency's properly exercise authority has a mere effect on rates established by another has recently been rejected by this Court. In *Northwest Central Pipeline Corp. v. State Corp. Comm. of Kansas*, —— U.S. ——, 103 L. Ed. 2d 509, 109 S. Ct. 1262 (1989), Kansas issued regulations directed at producers, which Kansas asserted was within its jurisdiction by reason of NGA § 1(b) which reserves to the states authority to regulate the "production and gathering of natural gas".[5] Certain pipelines asserted that the Kansas regulation was preempted because it might affect their gas purchase costs and hence their interstate rates which are subject to FERC regulation. This Court rejected that theory, holding:

> "It would be strange indeed to hold that Congress intended to allow the States to take measures to prorate production and set allowab'es in furtherance of legitimate conservation goals and in order to protect property rights, but that—because enforcement might have some effect on interstate rates—it did not intend that the States be able to enforce these measures by encouraging actual production of allowables." 103 L. Ed. 2d at 529.

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[5] The reservation clause in NGA § 1(b), often referred to as the "negative proviso", states that the provisions of the NGA granting authority to the FERC ". . . shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas."

It would indeed be even stranger to hold that Congress intended that FERC have authority to regulate the transportation of natural gas in interstate commerce but that —because exercise of that authority in a particular case might have some effect on rate and rate designs of local utilities—it did not intend that FERC would be able to approve the persons to whom interstate pipelines could deliver the gas without the consent of the States. Because the Court has so recently rejected such an "effect on rates" theory, National submits that this case is not sufficiently important to warrant review.

Another reason why this case is not sufficiently important to warrant review by this Court is that there is no conflict among the circuits. The D.C. Circuit reached the same conclusion as the Sixth Circuit below on the question of whether Panhandle's direct delivery of National's gas constituted the transportation of natural gas in interstate commerce" subject to jurisdiction of the FERC [6], and Respondent is aware of no decision of a Circuit Court which is in conflict with those decisions.

II. THE DECISION BELOW IS CONSISTENT WITH THE SCHEME OF REGULATION UNDER THE NGA, WHEREIN FERC REGULATES THE INTERSTATE TRANSPORTATION OF GAS AND STATES REGULATE THE LOCAL DISTRIBUTION OF GAS.

Michigan claims that the decision below violates the federal/state "dual regulatory scheme" under the NGA by finding that the transaction in question does not constitute the "local distribution" of natural gas by Panhandle to National. Michigan bases this claim on three arguments. First, Michigan asserts that although § 1(b) of the NGA gives FERC exclusive jurisdiction over the "transportation of natural gas in interstate commerce", it expressly reserves to the state's jurisdiction over "local distribution", the activity here is "local distribution", and the Sixth Circuit failed to articulate the difference

[6] Footnote 10, *supra*.

between "local distribution" and "transportation of natural gas in interstate commerce". Second, Michigan argues that prior to the NGA, states would have been able to regulate the activity in question and, by enacting the NGA, Congress did not intend to diminish the states' regulatory powers. Third, Michigan alleges that the result advanced by it is dictated by the *Panhandle/Michigan* case. Each of these arguments is misplaced.

A. The "Local Distribution" Argument.

The fundamental error throughout Michigan's argument is its *assumption* that Panhandle is engaging in "local distribution" merely by reason of its direct delivery to National of National's own gas, without analysis of what Congress meant by those words. Michigan fails to articulate the differences between "local distribution" and "transportation of natural gas in interstate comerce"; it simply advances the assertion, in dogmatic fashion, that if a pipeline delivers gas directly to an end user, it is engaged in "local distribution". The legislative history of Section 1(b) of the NGA, however, does not support that conclusion.

The Congressional intent regarding the "local distribution" language in the NGA is reflected in House Committee Report 709 [7] which contains an extensive discussion of the language which ultimately became § 1(b) of the NGA. The report states that the negative proviso language reserving certain areas of authority to the states merely reiterated the intent of Congress to withhold federal rate-setting jurisdiction over direct *sales* of natural gas:

> "In view of the importance of Section 1(b), which states the scope of the act, it seems advisable to comment on certain provisions appearing therein. It will

[7] H.R. Rep. No. 709, 75th Cong., 1st Sess. (1937). Report 1210 of the Senate Committee on Interstate Commerce, regarding H.R. 6586, merely adopted the House Committee Report 709.

be noted that this subsection of the bill, after affirmatively stating the matters to which the act is to apply contains a provision specifying what the act is not to apply to, as follows:

> 'but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or the facilities used for such distribution or to the production or gathering of natural gas.'

The quoted words are not actually necessary, as the matters specified therein could not be said fairly to be covered by the language affirmatively stating the jurisdiction of the Commission, but similar language was in previous bills, and, rather than invite the contention, however unfounded, that the elimination of the negative language would broaden the scope of the act the committee has included it in this bill. *That part of the negative declaration stating that the act shall not apply 'to the local distribution of natural gas' is surplusage by reason of the fact that distribution is made only to consumers in connection with sales, and since no jurisdiction is given to the Commission to regulate sales to consumers the Commission would have no authority over distribution, whether or not local in character.*" (H.R. Rep. No. 709, page 3, emphasis added)[8]

Based upon this legislative history, it is manifestly clear that the "local distribution" language in Sec. 1(b)

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[8] This court has recognized the significance of House Committee Report 709 in determining Congress' intent in enacting the NGA. For example in *Federal Power Comm. v. East Ohio Gas Co.*, 338 U.S. 464, 470, 94 L. Ed. 268, 70 S. Ct. 266, *reh'g denied*, 338 U.S. 905, 94 L. Ed. 1334, 70 S. Ct. 515 (1950), this court observed that ". . . the Committee Report [describes] the 'local distribution' provision as surplusage which was 'not actually necessary'." and in *Federal Power Comm. v. Louisiana Power & Light Co.*, 406 U.S. 621, 640, 32 L. Ed. 2d 369, 92 S. Ct. 1827 (1972), again relying on House Committee Report 709, this court held that the § 1(b) proviso language "was meant to apply exclusively to *rate-setting*, and in no wise limited to broad base of 'transportation' jurisdiction granted to the FPC."

of the NGA was intended by Congress to relate only to the federal/state division of jurisdiction between sales for resale and sales at retail, and the "local distribution" limitation meant only that the federal agency had no jurisdiction over sales at retail, "whether or not local in character". Interstate transportation plainly was not encompassed by the "local distribution" exemption.

In addition to the legislative history of § 1(b), the decisions of this Court make it clear that the activity involved in the Panhandle/National transaction constitutes the "transportation of natural gas in interstate commerce", subject to federal regulation. In *Federal Power Commission v. East Ohio Gas Co.*, 338 U.S. 464, 94 L. Ed. 268, 70 S. Ct. 266, *reh'g denied*, 338 U.S. 905, 94 L. Ed. 1334, 70 S. Ct. 515 (1950)[9] East Ohio Gas Co. operated pipeline facilities solely in Ohio and sold gas there directly to consumers through its local distribution system. The gas came into Ohio through interstate lines of other companies which connected with East Ohio's high pressure wholly intrastate pipeline. The Court found that East Ohio's facilities and activities up to the point where pressure of the gas was reduced upon injection into local mains were subject to federal jurisdiction under the NGA, notwithstanding the fact that those facilities were wholly within the State of Ohio and it made no sales of gas for resale. The Court rejected the argument that the word "transportation", as used in the NGA to define the scope of federal regulatory authority, applies only to facilities used for both transportation *and* sales for resale of natural gas, because the language of the Act simply did not support such an interpretation. The Court also found that the movement of gas in East Ohio's pipes

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[9] One reason why *East Ohio* is particularly well known regarding the scope of federal authority is that in 1954 the NGA was amended by the addition of the so-called "Hinshaw Amendment", Sec. 1(c), (which is not involved in this suit) for the purpose of limiting federal jurisdiction, in specific response to the Court's *East Ohio* decision.

was in interstate commerce, observing, "[t]hat this continuous flow of gas from other states to and through East Ohio's high pressure lines constitutes interstate transportation has been established by numerous previous decisions of this Court." (338 U.S. at 467.) The *East Ohio* decision cited, with approval, the above-quoted passage from the NGA's legislative history which limits "local distribution" to direct *sales* to consumers.

Having concluded that East Ohio came directly within the express provision granting power to the FPC to regulate "transportation of natural gas in interstate commerce", this Court held that federal jurisdiction is mandated and stated that "once a company is properly found to be a 'natural gas company', no state can interfere with federal regulation." (338 U.S. at 473.) Finally, this Court concluded that even if it might have been wiser for Congress to have created an exception to federal jurisdiction in the circumstances presented by East Ohio:

> ". . . we should not do so through the interpretative process. There is nothing in the legislative history which authorizes us to interpret away the plain congressional mandate." (338 U.S. at 474.)

This Court has also held that FERC has authority to regulate the interstate transportation of gas directly to an end-user even if a pipeline is making a retail sale which is not subject to FERC's rate regulation. For example, in the case of *Federal Power Commission v. Louisiana Power and Light Co.*, 406 U.S. 621, 32 L. Ed. 2d 369, 92 S. Ct. 1827 (1972), the question was whether, because of the shortage of natural gas, the FPC (FERC's predecessor) had jurisdiction to implement a curtailment program for United Gas Pipe Line with respect to both sales for resale *and* direct retail sales. Louisiana Power, a direct retail *sales* customer (thus a "local distribution" customer) of United challenged the application of the FPC's curtailment program to its gas purchase contract

with United claiming that the FPC had jurisdiction only over sales for resale, not retail sales. In holding that the FPC did indeed have jurisdiction over the curtailment of direct retail sales the Court first noted that the negative proviso in Sec. 1(b) of the NGA which states that federal jurisdiction does not apply to the "local distribution" of gas ". . . in no wise limited the broad base of 'transportation' jurisdiction granted the FPC." (406 U.S. at 640). In upholding the FPC's jurisdiction to curtail direct sales in interstate commerce, the Court stated:

> "Since curtailment programs fall within the FPC's responsibilities under the head of its 'transportation' jurisdiction, the Commission must possess broad powers to devise effective means to meet these responsibilities." (406 U.S. at 642)

Another case which illustrates how all-encompassing this court has construed the concept of interstate commerce in the movement of gas is *Interstate Natural Gas Co. v. Federal Power Commission*, 331 U.S. 682, 91 L. Ed. 1742, 67 S. Ct. 1482, *reh'g denied*, 332 U.S. 785, 92 L. Ed. 368, 68 S. Ct. 30 (1947), where the court held that gas which was sold and delivered to a pipeline inside Louisiana and *then* taken out of state was "in interstate commerce" even before the gas left the state. (331 U.S. at 667-668). The holding in *Interstate Natural* is significant because it makes clear that under the NGA gas purchased in one state commences its movement in interstate commerce prior to crossing a state line and, correspondingly, there is nothing in the NGA to suggest that interstate commerce ceases merely because the destination state line has been crossed and the gas is approaching the point of delivery. As long as the gas is in continuous movement it is being transported in interstate commerce, and FERC continues to have regulatory authority over the transaction through the point of delivery.

The implications of federal jurisdiction over *facilities* used in the transportation of natural gas in interstate

commerce are shown in *United Gas Pipe Line Co. v. Federal Power Commission*, 385 U.S. 83, 17 L. Ed. 2d 181, 87 S. Ct. 265 (1966). United, the purchaser, constructed a "short length of pipeline, a separator, a meter station and valves" to hook up to Continental, the seller. United obtained an FPC certificate of public convenience and necessity authorizing construction and operation of its new facilities and the transportation of the gas in the facilities from the point where it picked up the gas from Continental. Some time later, United refused to continue receiving gas from Continental. The Court upheld the FPC's determination that this constituted an abandonment of facilities and abandonment of a "service" to which Sec. 7(b) of the NGA (dealing with abandonments) applies. The Court, first noting that facilities certificated under Sec. 7(c) for the transportation of gas in interstate commerce are subject to the NGA Sec. 7(b) abandonment provisions, held:

> "*Thus, the 'facilities subject to the jurisdiction of the Commission' which are reached by the abandonment provisions of Sec. 7(b) are those facilities required for the interstate transportation of natural gas* and for the interstate sale of gas for resale to the ultimate consumer. Conversely, it would seem beyond argument that the proscription of abandoning 'any service' rendered by those facilities would include both transportation and sale, the twin functions which subject the facilities to the provisions of the Act." (385 U.S. at 86-87, emphasis added and footnote omitted)

United argued that the FPC could not order it to continue receiving gas from Continental because the FPC's jurisdiction over an abandoned "service" included only sales, and that United was *purchasing* and not *selling*. This court rejected United's contention and held that:

> "*The Act gives the Commission jurisdiction over interstate transportation of natural gas as a separate and distinct matter, whether the transportation is for*

> *hire or for sale and whether the sale is for consumption or resale.* (Citations omitted). Here, of course, the transportation is not for hire but for sale, some for consumption and some for resale . . . the term 'service' is not confined to sales but extends to the 'movement of gas in interstate commerce' and that one who engages in *either* the sale *or* the transportation of gas is performing a service within the meaning of both Sections 7(e) and 7(b). It could not be more clear that United here abandoned a 'service' . . ." (386 U.S. at 89, emphasis in original).

The clear teaching of *United* is that transportation of natural gas in interstate commerce is a separate and distinct subject of the FERC's jurisdiction under the NGA *even when there is no sale, wholesale or retail, being made by the certificated pipeline.*

Michigan claims that the Sixth Circuit was in error because it failed ". . . to articulate the differences between the interstate transportation of natural gas and the local distribution of such gas." (Petition, pg. 8) Although the Sixth Circuit did not engage in a lengthy discourse on the subject, it did not need to do so. The Sixth Circuit found the D.C. Circuit's description of the Panhandle/National transaction so extremely appropriate that it simply quoted the D.C. Circuit's blunt observation that:

> "It is hardly conceivable that a transaction could fit more neatly into the category of 'transportation of ntaural gas in interstate commerce' ".

If both the D.C. Circuit and the Sixth Circuit found Michigan's characterization of the Panhandle/National transaction to be "hardly conceivable", it is no wonder that they did not discuss the subject at length, and they were certainly not in error for having failed to do so.[10]

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[10] On page 13 of its Petition, Michigan asserts that the D.C. Circuit and the Sixth Circuit failed to provide any "reasoned analysis" as to why the transaction did not constitute "local distribution". However, no more analysis of the subject is required than

Another reason why the Sixth Circuit found it unnecessary to discuss the subject at length is that it relied on the decision of the District Court which *did* deal with the issue in detail. Finding the District Court's analysis entirely adequate, the Sixth Circuit stated:

> "In this case, the appellants argue that FERC did not have jurisdiction over the Panhandle-National Steel bypass because it amounted to the 'local distribution if natural gas' . . . However, we agree with the district court, *National Steel Corp.*, 689 F. Supp., at 734-36 . . . that the Panhandle-National Steel bypass 'involves merely interstate transportation of natural gas' (which is subject to FERC jurisdiction) and not local distribution." Appendix 8a-9a.

A review of the opinion of the District Court below reveals that the distinction between "local distribution" and interstate transportation of gas under the NGA is discussed at length. (Appendix, 25a-32a)

B. "Pre-NGA" Caselaw.

Michigan erroneously claims that, prior to the NGA, it could have regulated the Panhandle/National transaction, and therefore, since Congress did not intend by the NGA to reduce the regulatory powers of states, the Sixth Circuit was in error for concluding that the NGA preempted Michigan's exercise of regulatory authority. Michigan is wrong in two critical respects. First, the cases Michigan cites in support of its argument [11] simply do not

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arriving at the threshold conclusion that the transaction is "transportation of natural gas in interstate commerce" which, under NGA § 1(b) is mutually exclusive from "local distribution". *See* pg 17, *infra.*, regarding the "bright line" separating state and federal jurisdiction.

[11] *Missouri v. Kansas Gas Co.*, 265 U.S. 298, 307-309, 68 L. Ed. 1027, 44 S. Ct. 544 (1924); *Pennsylvania Gas Co. v. Public Service Comm.*, 252 U.S. 23, 30-31, 64 L. Ed. 434, 40 S. Ct. 279 (1920); *Public Utilities Comm. v. Landon*, 249 U.S. 236, 245-246, 63 L. Ed. 577, 39 S. Ct. 268 (1919), Michigan's petition, page 9.

support the proposition for which they are cited. Two of these cases involved the local *sale* of gas, not merely the interstate transportation of the customer's own gas, and the other involved sales at *wholesale*, which the Court held the state could *not* regulate. As the District Court below cogently observed with respect to pre-NGA cases:

> "There is no clear support for the proposition that a state ever had that power to regulate direct delivery of gas in interstate commerce—in the absence of a sale. The courts simply were never faced with the sort of transportation arrangement proposed here. To opine that state regulation of Panhandle's proposed transportation would have been deemed an acceptable burden upon interstate commerce would be pure speculation." *National Steel Corp. v. Long.*, 689 F. Supp. 729, 736 (W.D. Mich. 1988), Appendix, 34a.

In any event, *Congress* clearly understood that states could not regulate interstate transportation and it therefore enabled the federal agency to regulate that area.

Second, Michigan ignores the decisions of this Court which have held that by its precise language in drafting the NGA, Congress meant to draw a "bright line" between federal/state jurisdiction, making further analysis of commerce clause limitations on state authority unnecessary.[12] *Illinois Natural Gas Co. v. Central Illinois Public Service Co.*, 314 U.S. 498, L. Ed. 371, 62 S. Ct. 384 (1942); *Arkansas Electric Cooperative Corp. v. Arkansas Public Service Commission*, 461 U.S. 375, 76 L. Ed. 2d 1, 103 S. Ct. 1905 (1983); *Interstate Natural Gas v. Federal*

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[12] In *Southern California Edison, infra*, this Court held:

> "In short, our decisions have squarely rejected the view of the Court of Appeals that the scope of FPC jurisdiction over interstate sales of gas or electricity at wholesale is to be determined by a case-by-case analysis of the impact of state regulation upon the national interest. *Rather, Congress meant to draw a bright line easily ascertained, between state and federal jurisdiction, making unnecessary such case-by-case analysis.*" (376 U.S. at 215-216, emphasis added).

Power Commission, supra, (1947); *Phillips Petroleum Co. v. State of Wisconsin,* 347 U.S. 672, 98 L. Ed. 1035, 74 S. Ct. 794, *reh'g, denied,* 348 U.S. 851, 99 L. Ed. 670, 75 S. Ct. 17 (1954); *Federal Power Commission v. Southern California Edison Co.,* 376 U.S. 205, 11 L. Ed. 2d 638, 84 S. Ct. 644, *reh'g denied,* 377 U.S. 913, 12 L. Ed. 2d 183, 84 S. Ct. 1161 (1964). Therefore, while the pre-NGA cases are relevant in putting the subject in proper historical perspective, it is the language of the NGA which now controls.[13]

C. *Panhandle/Michigan.*

Throughout its Petition, Michigan relies heavily on *Panhandle/Michigan, supra,* which it claims is controlling of the outcome in this case. This reliance is misplaced, however, because in that case Panhandle proposed to *sell* gas to Ford Motor Company at the point of delivery of the gas to Ford, in Michigan. There was no question in that case but that the proposed activity was "local distribution", as contemplated by § 1(b) of the NGA. *Panhandle/Michigan* was not a preemption case, it was a burden on commerce case. The issue there was whether, notwithstanding the NGA § 1(b) proviso, Michigan could, without burdening commerce, impose *certificate* requirements as a precondition of Panhandle's sale of gas, thus potentially prohibiting the sale for want of a certificate as opposed to merely regulating the sale. Here, the transaction clearly involves the interstate transportation of gas, from receipt to redelivery, by a federally regulated interstate pipeline. No retail sale within the "local distribution" exception of § 1(b) occurs. Because there is no local sale taking place, and because all Panhandle is doing is picking up National's gas in one state and de-

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[13] As the District Court below summarized the point, "In fact, the § 1(b) bright line, 'clear and complete', 'easily ascertained', was specifically designed to obviate the need for such analysis.", citing *Southern California Edison, supra.*

livering National's gas to it in another state, both the D.C. Circuit and the Sixth Circuit found that it was ". . . hardly conceivable that a transaction could fit more neatly into the category of 'transportation of natural gas in interstate commerce' ". That being so, it is hardly conceivable that Michigan's "local distribution" argument warrants consideration by this court.

Another critical reason why this case is fundamentally different from the *Panhandle/Michigan* case is that here, the proposed direct service by Panhandle has been subject to *close regulatory scrutiny* by the FERC. Forty years ago, when Panhandle embarked on a marketing program to provide direct *sales* service to industrial customers in the midwest, Panhandle intended that the transactions would not be subject to any regulation at all.[14] That was found objectional by this Court and it refused to accept what Panhandle envisioned as an "attractive gap" in regulation.[15] In this case, Panhandle sought and obtained a certificate of public convenience and necessity from the FERC to provide the transportation service and construct the necessary facilities to make the direct delivery of the gas. The certificate was issued only after FERC had conducted a full contested case hearing, during which Michigan and MichCon had the opportunity to present witnesses and present argument as to why Panhandle's direct service to National was not in the public convenience and necessity. Thus, this Court need not be concerned that the public interest has not been taken into consideration. Quite to the contrary, FERC, the responsible administrative agency, has exhaustively reviewed all public interest issues relating to the provision of direct interstate transportation service to National.

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[14] *Panhandle Eastern Pipe Line Co. v. Public Service Commission of Indiana*, 332 U.S. 507, 509 n.3, 92 L. Ed. 128, 68 S. Ct. 190 (1947).

[15] *Id.*, at 524.

III. THE SIXTH CIRCUIT'S ANALYSES OF THE PREEMPTION ISSUES WERE ENTIRELY CONSISTENT WITH § 1(b) OF THE NGA.

Having concluded that Congress did not expressly reserve to Michigan the authority to regulate the Panhandle/National transaction by reason of the "local distribution" proviso of § 1(b), the Sixth Circuit proceeded to decide whether Michigan could, notwithstanding, regulate the transaction based on the notion of dual federal/state jurisdiction envisioned by Congress when it enacted the NGA. The Court held, however, that the duality of regulatory authority under the NGA was intended to be *sequential*, not simultaneous, because otherwise conflicts would arise between the respective federal and state authorities. Therefore, the Court having concluded that Congress did not intend that there be federal and state regulation over the same transaction, the question became one of preemption. The Court first observed that because the NGA did not explicitly preempt state law in the case of direct pipeline deliveries, it would have to determine whether Congress implicitly indicated an intent to occupy the field in which Michigan intended to exercise regulatory authority. Citing *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 99 L. Ed. 2d 316, 108 S. Ct. 1145 (1988), the Court stated that preemption may be inferred:

> ". . . [1] where the pervasiveness of the federal regulation precludes supplementation by the States, [2] where the federal interest in the field is sufficiently dominant, or [3] where "the object sought to be obtained by the federal law and the character of obligations imposed by it . . . reveal the same purpose." [citations omitted] Finally, even where Congress has not entirely displaced state regulation in a particular field, [4] state law is pre-empted when it actually conflicts with federal law. Such a conflict will be found " 'when it is impossible to comply with both state and federal law, [citations omitted], or where the state law stands as an obstacle to the accomplish-

> ment of the full purposes and objetctives of Congress'. *Schneidewind, supra,* 108 S. Ct. at 1150-51." (Appendix, 10a)

The Court below then concluded that by a "meticulously drawn statement of federal jurisdiction" (Appendix, 11a) Congress intended to occupy the field in which Michigan intended to regulate. The Court also concluded that the MPSC's regulation of the National/Panhandle transaction "would obstruct the execution of the *complimentary* relationship between state and federal regulation" (Appendix, 11a), and would "permit the MPSC to cancel the FERC's approval" of the transaction.[16]

Michigan claims that the Sixth Circuit's preemption analysis was erroneous. The claimed error upon which Michigan focuses, however, remains the Court's conclusion that the Panhandle/National transaction does not constitute "local distribution". Michigan tries to buttress its argument here, however, by relying on the Court's recent decision in *Northwest Central Pipeline, supra.* Michigan notes that in *Northwest Central Pipeline* this Court was faced with a Kansas regulation aimed primarily at gas producers, and that the regulation was upheld [17] because the NGA § 1(b) proviso reserves to the states the jurisdiction to regulate the production and gathering of natural gas (in addition to "local distribution"). Michigan then poses the rhetorical question:

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[16] Although not a point expressly relied on by the Court below, MPSC certification of the transaction would also result in state regulation of Panhandle's interstate transportation *rates.* The Michigan statute in question, MCLA § 460.501 *et seq.*, provides in section 5 that "In determining the question of public convenience and necessity the commission *shall take into consideration* . . . the benefit, if any, to the public in *the matter of rates* and such other matters as shall be proper and equitable . . . ." (emphasis added)

[17] In *Northwest Central Pipeline,* FERC appeared as amicus curiae *in support* of the Kansas Corporation Commission and the validity of that state's regulation.

> "If, however, a single company performed both as a producer of gas in Kansas and as an interstate pipeline transporting that gas in interstate commerce, would the nature of that company's entire activities make its production activities any less subject to Kansas' regulation with respect to local production? Michigan thinks not." Petition, page 16.

Michigan then proceeds to draw the conclusion that the mere fact that Panhandle is an interstate pipeline transporting gas in interstate commerce should not divest Michigan of regulatory authority over the "local distribution" of gas merely because it is part of a larger transaction also involving the interstate transportation of gas.[18] The point that Michigan misses, however, is that the *entire* transaction here is the transportation of gas in interstate commerce—from beginning to end. There is no other aspect of the transaction that is even potentially the subject of state jurisdiction. The interstate transportation cannot be separated from the delivery because it is not complete until delivery is made. Interstate transportation can no more be separated from delivery of gas than it can be from receipt of the gas. Thus, there is no basis for applying the § 1(b) proviso.

Michigan also argues (Petition, pages 14-15) that *Northwest Central Pipeline*, *supra*, recognizes that a state law may impact matters within FERC's control without being preempted if the state's purpose is to regulate matters which are the subject of state jurisdiction. Although that general proposition may be true, it is wholly inapplicable to this case. In *Northwest Central Pipeline*, the pipelines unsuccessfully complained that the Kansas regulation, applicable only to producers, could affect purchasing deci-

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[18] Indeed, the authority for that proposition (which Michigan should have cited, but did not) is *Panhandle/Michigan*, where Panhandle's activity of *selling* gas locally was held subject to state regulation because of NGA § 1(b), notwithstanding the fact that it was part of a larger transaction involving the interstate transportation of the gas which was to be sold at retail.

sions of the pipelines, with a resulting impact on their cost structures and interstate rates. 103 L. Ed. 2d 529. The Court held that to find field preemption in such a circumstance would largely nullify the authority over production and gathering, which Congress expressly preserved to the states.[19] Here, the Court's finding of preemption was not because Michigan's exercise of authority would impact on areas of FERC responsibility while acting within areas (i.e., "local distribution") reserved to it under NGA § 1(b). Rather, the Court expressly found that Michigan was *not* acting within an area reserved to it (i.e., "local distribution"), and that preemption was applicable because Michigan was attempting to regulate within the area which the NGA assigned exclusively to the FERC—transportation of natural gas in interstate commerce.

Michigan also argues that § 1(b) is an "anti-preemption provision", and that the Sixth Circuit incorrectly concluded that the imminent possibility of a conflict between federal/state regulation necessitated a finding of preemption under *Schneidewind, supra.* Again, the obvious fallacy in Michigan's argument is that the so-called "anti-preemption provision" to which it refers is simply not applicable here because the transaction in question involves "transportation of natural gas in interstate commerce" and not "local distribution."

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[19] The Court in *Northwest Central Pipeline* distinguished two cases heavily relied on by the pipelines, *Northern Natural Gas Co. v. State Corporation Comm'n of Kansas*, 372 U.S. 84, 9 L. Ed. 2d 601, 83 S. Ct. 646, *reh'g denied*, 372 U.S. 960, 10 L. Ed. 2d 14, 83 S. Ct. 1011 (1963) and *Transcontinental Pipe Line Corp. v. State Oil and Gas Board*, 474 U.S. 409, 88 L. Ed. 2d 732, 106 S. Ct. 709, *reh'g denied*, 475 U.S. 1091, 89 L. Ed. 2d 738, 106 S. Ct. 1485 (1986) which held that a state's "ratable-take order" directed at an interstate pipeline, requiring it to take gas from multiple suppliers in a single field, "invalidly invade[d] the federal agency's exclusive domain". Like those cases, in the name of protecting "local interests" the aim of the MPSC here is directly at the pipeline and its provision of interstate natural gas service, an area exclusively within the federal agency's domain.

Moreover, far from having a preemptive effect, the legislative history makes clear that the proviso was intended to be narrow in its effect and merely address "retail sales" by a pipeline, a matter which "could not be fairly said to be covered by the language affirmatively stating the jurisdiction of the Commission." See pg. 10, *supra.*

The only portion of Michigan's preemption argument which does not assume, as its predicate, that the transaction involves "local distribution" is the theory that no federal/state conflict *in fact* exists over Michigan's attempt to regulate the transportation of natural gas in interstate commerce in this case. Michigan's theory is that National has always been able to transport its gas from the producing state, through Panhandle's pipeline and *into MichCon's system* for redelivery to National's plant, and that the rates for such interstate transportation service remain fully subject to FERC regulation, unaffected by the state's actions. Therefore, if National were to continue transporting its gas in that fashion, there would be no problem. Put another way, Michigan's argument is simply that if FERC would require National and Panhandle to restructure their transaction as *Michigan* would like to require, no conflict would exist. This argument (for which Michigan cites no supporting authority) obviously misses the point. The fact is, it is the FERC which has responsibility for determining whether a particular set of facilities and a particular mode of effecting the interstate transportation of natural gas is in the public convenience and necessity under § 7(c) of the NGA. With respect to the specific Panhandle/National transaction in question, the FERC has explicitly made a finding that the direct delivery of National's gas by Panhandle to National's Michigan plant would be in the public convenience and necessity, as opposed to requiring the added step of requiring National to deliver its gas through MichCon's system. Obviously, Michigan disagrees with the FERC's decision, and that is precisely why there is an

imminent possibility of a conflict and why, under *Schneidewind*, preemption clearly exists.

FERC comprehensively regulates all aspects of Panhandle's transportation facilities, rates and services. If Michigan can tinker with facilities for interstate gas transportation or the terms of service, the range of potential conflicts would mount rapidly and the ability of FERC effectively to perform its regulatory responsibility over interstate transportation would be thoroughly undermined.

PRAYER FOR RELIEF

WHEREFORE, this Court should deny Michigan's Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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Dated: March 28, 1990

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CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

STATE OF MICHIGAN, MICHIGAN PUBLIC SERVICE COMMISSION, WILLIAM E. LONG AND EDWYNA G. ANDERSON,

Petitioners,

v.

PANHANDLE EASTERN PIPE LINE COMPANY and NATIONAL STEEL CORPORATION,

Respondents.

STATE OF MICHIGAN AND MICHIGAN PUBLIC SERVICE COMMISSION,

Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,

Respondent.

On Petitions for Writs of Certiorari to the United States Courts of Appeals for the Sixth and the District of Columbia Circuits

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BRIEF FOR PANHANDLE EASTERN PIPE LINE COMPANY IN OPPOSITION

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QUESTIONS PRESENTED

Whether the Natural Gas Act of 1938: (1) Confers exclusive jurisdiction upon the Federal Energy Regulatory Commission to authorize the transportation by an interstate pipeline of natural gas purchased by an industrial consumer in one state and delivered in another state; and (2) Preempts the state to which the gas is transported from requiring the interstate pipeline to obtain a state certificate in order to perform the service authorized by the federal agency.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-1160

STATE OF MICHIGAN, MICHIGAN PUBLIC SERVICE COMMISSION, WILLIAM E. LONG AND EDWYNA G. ANDERSON,

Petitioners,

v.

PANHANDLE EASTERN PIPE LINE COMPANY and NATIONAL STEEL CORPORATION,

Respondents.

No. 89-1161

STATE OF MICHIGAN AND MICHIGAN PUBLIC SERVICE COMMISSION,

Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,

Respondent.

On Petitions for Writs of Certiorari to the United States Courts of Appeals for the Sixth and the District of Columbia Circuits

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BRIEF FOR PANHANDLE EASTERN PIPE LINE COMPANY * IN OPPOSITION

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* Panhandle Eastern Pipe Line Company, a respondent herein, is a wholly-owned subsidiary of Panhandle Eastern Corporation, which is publicly-owned. Panhandle Eastern Corporation has only one affiliate that has publicly owned voting securities, TEPPCO Partners, LP.

OPINIONS BELOW

The petitions for writs of certiorari in No. 89-1160 and No. 89-1161 are integrally related. The petition in No. 89-1160 seeks review of a decision of the Sixth Circuit; the petition in No. 89-1161 seeks review of a decision of the District of Columbia Circuit. The opinion of the Sixth Circuit (Pet. App.[1] (89-1160) 1a-12a) is reported at 887 F.2d 1295; the opinion of the district court in that case (*id.*, 21a-41a) is reported at 689 F. Supp. 729. The opinion of the District of Columbia Circuit (Pet. App. (89-1161) 1a-17a) is reported at 883 F.2d 117; the agency orders in that case (*id.*, 22a-64a; 65a-86a; and 93a-221a (initial decision)) are reported at 42 F.E.R.C. ¶ 61,076; 40 F.E.R.C. ¶ 61,220; and 38 F.E.R.C ¶ 63,009, respectively.

JURISDICTION

In No. 89-1160, the judgment of the Sixth Circuit was entered on October 6, 1989, and a petition for rehearing was denied on November 3, 1989; the petition for a writ of certiorari was filed on January 24, 1990. In No. 89-1161, the judgment of the District of Columbia Circuit was entered on August 18, 1989, and a petition for rehearing and suggestion for rehearing *en banc* were denied on October 26, 1989; the petition for a writ of certiorari was filed on January 24, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The instant petitions for certiorari seek review of: (1) a decision of the District of Columbia Circuit affirming orders of the Federal Energy Regulatory Commission ("FERC" or "Commission") which granted authorization for the transportation of natural gas in interstate commerce from Oklahoma to Michigan and for the connecting

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[1] "Pet. App." refers to the appendices filed by petitioners in Nos. 89-1160 and 89-1161, respectively.

facilities; and (2) a decision of the Sixth Circuit affirming the judgment of a district court, which held that this action by FERC and the provisions of the Natural Gas Act preempted the regulatory authority of the State of Michigan over this transaction.

A. Statutory Background

The interstate natural gas industry is regulated by FERC, principally under the Natural Gas Act of 1938, 15 U.S.C. 717-717z. Section 1(b) of that Act, 15 U.S.C. 717(b), which establishes the scope of FERC's regulatory jurisdiction in this field, provides as follows:

> The provisions of this [Act] shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas.

In turn, Section 7 of the Natural Gas Act, 15 U.S.C. 717f, grants to FERC one of its chief substantive powers, namely the power to issue certificates of public convenience and necessity authorizing the construction, acquisition or operation of facilities for, among other things, the transportation of natural gas in interstate commerce, and the providing of interstate transportation service, and to authorize abandonment of any jurisdictional facilities or services.

B. The Facts of This Case

In this case, the Commission, acting pursuant to Section 7 of the Natural Gas Act, issued a certificate of public convenience and necessity authorizing respondent Panhandle Eastern Pipe Line Company ("Panhandle"), an interstate natural gas pipeline, to render a third-party

transportation service for respondent National Steel Corporation ("National Steel"), which operates a steel plant in Michigan. Specifically, FERC authorized Panhandle to transport gas from Oklahoma, where it is purchased by National Steel, to National Steel's plant site in Michigan, and to install delivery tap facilities to perform this service.

National Steel theretofore had received all of the gas supplies for its plant through the facilities of Michigan Consolidated Gas Company ("MichCon"), a local distribution company regulated by petitioner Michigan Public Service Commission, an agency of the State of Michigan (collectively, "MPSC"). MPSC, among others, took the position in the FERC proceedings that a state statute, Michigan Act 69 of the Public Acts of 1929 ("Act 69"), Mich. Comp. Laws 460.501-460.502 (Pet. App. (89-1160) 42a-44a), required Panhandle to obtain from the MPSC a *state* certificate of public convenience and necessity for this service to National Steel. It argued that the transaction was outside the FERC's jurisdiction.

FERC rejected the MPSC's position, concluding that it had exclusive jurisdiction over all aspects of the proposed transportation and delivery of gas by Panhandle. Pet. App. (89-1161) 50a-55a. FERC found on the evidentiary record that the public convenience and necessity supported the transaction, and issued a certificate to Panhandle for these services. On judicial review of FERC's orders, the District of Columbia Circuit affirmed, both on the merits of FERC's decision and on its finding of jurisdiction. *Id.* at 8a-10a. That court found it unnecessary to reach the question whether FERC's orders preempted the authority of the MPSC under Michigan Act 69. *Id.* at 10a.

The district court in Michigan, however, found that the FERC-issued certificate does preempt the MPSC from enforcing Act 69 against Panhandle, concluding that FERC's authority encompassed both the transportation of

gas and its ultimate delivery by Panhandle to National Steel. Pet. App. (89-1160) 21a-39a. The Sixth Circuit affirmed in a thorough opinion. *Id.* at 1a-12a.

In this Court, the MPSC does not challenge the correctness of FERC's orders on the merit of Panhandle's request for a certificate to transport and deliver gas to National Steel's plant, but seeks review only on the jurisdictional question.

ARGUMENT

The District of Columbia Circuit found in a well-reasoned opinion that delivery by an interstate pipeline of natural gas from a supply source in one state to an industrial consumer in another state constitutes an inseparable part of interstate transportation, which plainly falls within FERC's exclusive jurisdiction under the Natural Gas Act. In turn, the Sixth Circuit found in an equally well-reasoned opinion that there is no room under the federal statutory framework for potentially conflicting state regulation of precisely the same deliveries. These decisions do not conflict with any decision of this Court or any other court of appeals. Review by this Court is not warranted.

1. The courts below properly rejected the MPSC's claim that the *deliveries* of gas by Panhandle to National Steel should be regarded as distinct from the *interstate transportation* of this gas from Oklahoma to Michigan, and separately regulated by the MPSC as "local distribution."

a. Initially, the District of Columbia Circuit correctly held that the delivery of gas by an interstate pipeline to an industrial consumer falls within the "interstate transportation" of gas regulated exclusively by FERC. That such deliveries constitute interstate transportation and not local distribution is well settled by the decisions of this Court and other courts. Thus, for example, in *FPC* v. *Louisiana Power & Light Co.*, 406 U.S. 621 (1972), the

Court held that FERC's predecessor, the Federal Power Commission ("FPC"), had the authority by virtue of its jurisdiction over interstate transportation to order the curtailment of deliveries by an interstate pipeline to an industrial consumer during a period of shortages, as a means of conserving scarce gas supplies for higher-priority residential and commercial consumers. Section 1(b), the Court found, preserved state jurisdiction only over the rates for *sales* of gas by the pipeline to industrial consumers; all other aspects of such service by the pipeline came under "the broad base of 'transportation' jurisdiction granted the FPC." 406 U.S. at 640. *Accord FPC* v. *Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1 (1961) (affirming Commission jurisdiction over transportation and delivery of third-party gas by an interstate pipeline); *see also Maryland* v. *Louisiana*, 451 U.S. 725, 755 (1981) (concluding that "[g]as crossing a state line at any stage of its movement to the ultimate consumer is in interstate commerce during the entire journey"); *United Gas Pipe Line Co.* v. *FPC*, 385 U.S. 83, 89 (1966) (Section 1(b) "gives the Commission jurisdiction over interstate transportation of natural gas as a separate and distinct matter, whether the transportation is for hire or for sale and whether the sale is for consumption or resale"); *International Paper Co.* v. *FPC*, 438 F.2d 1349, 1355 (2d Cir.), *cert. denied*, 404 U.S. 827 (1971) (holding that federal transportation jurisdiction under Section 1(b) encompasses interstate transportation by an industrial consumer of its own gas through its own pipeline).

It follows, then, that Panhandle's delivery of gas to National Steel cannot be said to constitute "local distribution" subject to state regulation. As this Court has explained, "what Congress must have meant by 'facilities' for 'local distribution' was equipment for distributing gas among consumers within a particular local community, not the high-pressure pipe lines transporting the gas to the local mains." *FPC* v. *East Ohio Gas Co.*, 338 U.S. 464, 469-470 (1950). Under this settled interpretation of Sec-

tion 1(b), the taps and related facilities connecting Panhandle's high-pressure interstate pipeline to the National Steel plant are not "local mains," and the delivery of gas through such facilities, therefore, is not "local distribution" within the meaning of Section 1(b).

On the contrary, these facilities plainly fall within FERC's exclusive jurisdiction over interstate pipeline facilities and operations. By asserting jurisdiction over these same facilities, the MPSC essentially seeks to have its own regulatory say over the FERC-approved transaction. Nor is there merit to the MPSC's claim of concurrent or sequential jurisdiction in this circumstance. *See National Fuel Gas Supply Corp.* v. *Public Serv. Comm'n*, 894 F.2d 571, 576-577 (2d Cir. 1990).

Moreover, the MPSC's claim would do violence to the entire structure of federal regulation. The act of "delivering" is an integral part of the transportation for wholesale customers, or the sale for resale to such customers. It is well-settled under the Natural Gas Act that the states have no jurisdiction over the delivery of natural gas by an interstate pipeline to a local distribution company for resale to the local distribution company's retail customers. *E.g., Illinois Natural Gas Co.* v. *Central Illinois Public Serv. Co.*, 314 U.S. 498 (1942). Since these transactions involve the same "delivery" act as the transportation for an industrial customer, Petitioners' contention must fail. There is no basis in the statute for the MPSC's singular claim that the states should be deemed to have jurisdiction over a pipeline's transportation deliveries to an industrial consumer such as National Steel.

Thus, the District of Columbia Circuit was on exceptionally firm ground in affirming FERC's determination that deliveries of gas by Panhandle to National Steel are within FERC's exclusive jurisdiction over "interstate transportation" and do not at any point constitute the "local distribution" of gas within the meaning of Section 1(b). As the court aptly stated, "Panhandle's role under the arrangement is simply to transport National's gas

from one state to another across several intervening states. It is hardly conceivable that a transaction could fit more neatly into the category of 'transportation of natural gas in interstate commerce.'" Pet. App. (89-1161) 9a.

b. In this circumstance, the Sixth Circuit likewise correctly held that the FERC-issued certificate preempted the MPSC's authority under Michigan Act 69 to require that Panhandle obtain a state certificate of public convenience and necessity for its delivery of gas to National Steel. As the district court stated in the case below, FERC's plenary authority over interstate transportation extends "to the point of delivery and covers the facilities through which the gas is delivered." Pet. App. (89-1160) 25a (citations omitted).

Hence, the Sixth Circuit and the district court properly concluded that there is no point at which Panhandle's transportation and delivery of gas in this case can be said to bring Panhandle within the regulatory authority of the MPSC. As the court of appeals stated: "Were we to permit the MPSC to cancel the FERC's approval of the Panhandle-National Steel bypass, we would subordinate federal regulatory power to state regulatory power in the complete absence of authority to do so." Pet. App. (89-1160) 11a.

Moreover, as both the Sixth Circuit and the district court noted, the foregoing conclusion finds strong support in this Court's opinion in *Schneidewind* v. *ANR Pipeline Co.*, 485 U.S. 293 (1988), which recently rejected MPSC's attempt to assert jurisdiction over the issuance of securities by FERC-regulated interstate pipelines. The Court held the MPSC's authority preempted by the Natural Gas Act. Although the Act does not expressly authorize FERC to regulate such securities issuance, the Court in *Schneidewind* found that "the things [the MPSC's] regulation is directed at, the control of rates and facilities of natural gas companies, are precisely the things over which FERC has comprehensive authority." 485 U.S. at 308. In the instant case, the MPSC's claim of authority falls even

more squarely in the federal domain, since it directly seeks to regulate interstate transportation, which is expressly within the statutory grant of authority to FERC.[2]

c. The MPSC asserts that this case presents issues of importance to Michigan ratepayers because of what it terms the "bypass" of MichCon's facilities by Panhandle. Pet. (89-1160) 5-6; Pet. (89-1161) 6-7. Both the MPSC and MichCon, however, had ample opportunity, which they exercised, in extensive hearings before the administrative agency to present evidence and arguments on the local impact of Panhandle's proposed deliveries of gas to National Steel. Thus, the local impact question was fully aired before the FERC. On the basis of the record as a whole, both the administrative law judge and the Commission found that the public convenience and necessity warranted the authorization requested by Panhandle, and the District of Columbia Circuit affirmed such findings on the merits. The MPSC's claim of jurisdiction overlooks Justice Black's admonition in the *East Ohio* case that "[r]egardless of whether it might have been wiser and more farseeing statesmanship for Congress to have [permitted

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[2] Nor does this Court's opinion of last term in *Northwest Central Pipeline Corp.* v. *State Corporation Comm'n*, —— U.S. ——, 109 S.Ct. 1262 (1989), support the MPSC's claim of jurisdiction here. That case concerned the validity of a state conservation agency order that cancelled after a certain time the right of any natural gas producer to make up in a later period the amounts by which it under-produced from its wells under the state's proration rules in earlier periods. FERC in that instance supported the state's view that its order did not interfere with the federal scheme of regulation of interstate pipelines, although the pipelines' ability to purchase gas and the price of such purchases admittedly was affected. The Court agreed, distinguishing its previous decisions in *Transcontinental Gas Pipe Line Corp.* v. *State Oil & Gas Board*, 474 U.S. 409 (1986), and *Northern Natural Gas Co.* v. *State Corporation Comm'n*, 372 U.S. 84 (1963), which held similar state orders to be preempted when directed at interstate pipeline purchasers rather than at producers. Here, too, the MPSC seeks to regulate the interstate pipeline itself, and so this case is more akin to *Transcontinental* and *Northern Natural* than to *Northwest Central*.

state jurisdiction in this circumstance], we should not do so through the interpretative process." 338 U.S. at 474.

2. Finally, the decisions of the courts below do not conflict with this Court's decisions in *Panhandle Eastern Pipe Line Co.* v. *Michigan Public Serv. Comm'n*, 341 U.S. 329 (1951), or *Panhandle Eastern Pipe Line Co.* v. *Public Serv. Comm'n of Indiana*, 332 U.S. 507 (1947), as the MPSC alleges (Pet. (89-1161) 9-13). Those cases involved Commerce Clause challenges to state regulatory orders governing *sales* of gas by interstate pipelines to industrial consumers within the state. Here, in contrast, Panhandle makes no sales to National Steel, either in Michigan or elsewhere, but merely transports gas purchased by National Steel from a third-party producer in Oklahoma. Thus, the authority of the states over consumptive sales of gas within their borders simply is not presented in this case.

Moreover, as the Court expressly cautioned in both of the *Panhandle* cases (332 U.S. at 523; 341 U.S. at 336; *see also id.* at 338 (Frankfurter, J., dissenting) (quoting from the government's brief as *amicus curiae*)), there were in those cases no orders by FERC's predecessor, the Federal Power Commission, posing any conflict with the states' claims of authority. In the instant case, of course, FERC expressly authorized Panhandle's transportation and delivery of gas for National Steel, and in so doing specifically found that its jurisdiction was exclusive. *See* Pet. App. (89-1161) 54a-55a. Given this well-considered action by the agency charged by Congress with administering the Natural Gas Act, the MPSC's conflicting claim of authority plainly does not find support in the two *Panhandle* opinions of this Court.

CONCLUSION

For the foregoing reasons, the Court should deny the MPSC's petitions for writs of certiorari.

Respectfully submitted,

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